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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EXXON CORPORATION,

Petitioner,

vs.

JOHN RICHARD LUDBROOKE YOUELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the existence of a potential federal law issue in an insurance coverage dispute *require* a district court to entertain an insurer's action under the Declaratory Judgment Act when a policyholder's first-filed state court action raising the same coverage issues is pending?

THE PARTIES

The Petitioner in this action is Exxon Corporation ("Exxon"). Exxon has no corporate parent. A list identifying Exxon's nonwholly owned subsidiaries appears at Appendix E.

The Respondents are John Richard Ludbrooke Youell, an underwriter at Lloyd's of London, for himself and as a representative of those other underwriters severally subscribing to certain Global Corporate Excess Insuring Agreements at issue, and certain London Market Insurance Companies and other underwriting entities. A list identifying respondents appears at Appendix F.

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The opinion of the United States Court of Appeals for the Second Circuit, after this Court's previous remand for further consideration in light of *Wilton* v. *Seven Falls Co.*, 515 U.S. ___, 115 S. Ct. 2137 (1995), is reported at 74 F.3d 373 and reprinted as Appendix A hereto. This Court's order granting certiorari and remanding the case to the Second Circuit is reported at 516 U.S. ___, 116 S. Ct. 43 (1995), and reprinted as Appendix B hereto. The court of appeals' prior opinion, which this Court vacated, is reported at 48 F.3d 105 and reprinted as Appendix C hereto. The memorandum decision of the United States District Court for the Southern District of New York (Preska, J.) is available only on the Westlaw and Lexis electronic databases and is reprinted as Appendix D hereto.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1333 provides, in pertinent part:

> **Admiralty, maritime and prize cases**
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides, in pertinent part:

> In a case of actual controversy within its jurisdiction . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This petition arises from the Second Circuit's decision, on this Court's remand for further consideration in light of *Wilton* v. *Seven Falls Co.*, 515 U.S. ____, 115 S. Ct. 2137 (1995), to adhere to its prior holding that a federal district court *must* entertain an insurer's duplicative mirror-image declaratory judgment action, despite the pendency of an insured's first-filed state court action, if a novel issue of federal law is presented.

The parallel cases involve insurance consequences arising out of the accidental grounding of the *Exxon Valdez* in Alaska and the resulting catastrophic oil spill. Petitioner Exxon Corporation ("Exxon") filed a state court action (the "Texas Action") asserting coverage under insurance policies issued by respondents.[1] Thereafter, respondents brought the

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[1] Exxon is insured under a comprehensive package of insurance known as Global Corporate Excess (GCE) Coverage (also referred to herein as the GCE Agreements). The respondents are more than 100 insurance companies and 150 underwriting syndicates on the 1988-89 GCE Coverage. Exxon's rights under Section IIIA of the GCE Coverage are being litigated in the Texas Action, and a trial date of April 9, 1996 has been set. Exxon's rights under another part of the GCE Coverage, Section IIIB, are the subject of arbitration. The parties have settled

present declaratory judgment action in federal court (the "New York Action"). Although the district court possessed admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1), it exercised its discretion and dismissed the complaint in the New York Action in deference to the first-filed Texas Action.

The issue now before the Court is whether this duplicative federal action should proceed, in light of this Court's recent ruling in *Wilton* v. *Seven Falls Co.* that federal district courts have "unique and substantial" discretion in determining whether to stay or dismiss an action under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). The court of appeals, however, ruled that the district court had no discretion to dismiss the case. This ruling was based on the belief that one of the underlying substantive questions affecting insurance coverage should be resolved by creating new federal law rather than by applying settled state law or by leaving it to the state courts which have concurrent jurisdiction to decide the issue. Thus, the court of appeals did not remand the case to the district court to allow that court to exercise its discretion in the first instance.

(i) Background Facts

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, 25 miles south of Valdez, Alaska. Approximately 258,000 barrels of crude oil — about 20% of the ship's cargo — spilled into Prince William Sound. Eventually, a large portion of the oil washed onto adjacent shorelines. Exxon, as the owner of the cargo of crude oil, has incurred billions of dollars in expenses and liabilities for cargo loss, clean up, third-party claims, and related losses. On April 4, 1989, Exxon notified respondents that it would be claiming GCE Coverage for clean-up

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Exxon's claims under Section I of the GCE Coverage for $300 million.

expenses and third-party liabilities. By letters dated October 30, 1990, and November 12, 1990, respondents denied all of Exxon's claims for coverage. For three years after their denial of coverage, respondents adhered to that denial but continued to insist that Exxon provide additional information.

(ii) The Texas and New York Actions

On August 4, 1993, Exxon commenced the Texas Action against respondents because of their denial of Exxon's claims under the GCE Agreements. In the Texas Action, Exxon asserted claims for breach of contract, breach of respondents' covenant of good faith and fair dealing, and violations of the Texas Insurance Code.

Respondents reacted to the Texas Action by commencing the virtually identical New York Action seeking a declaration that "there is no coverage for Exxon's insurance claims arising out of the stranding of the EXXON VALDEZ and the resultant oil pollution." One of the arguments raised in the Texas and New York Actions is that Exxon's alleged recklessness in permitting an alleged alcoholic employed by a subsidiary, Exxon Shipping Company, to command the *Valdez* rendered the losses caused by the stranding non-fortuitous. Exxon disputes this characterization of its conduct but maintains that, even if respondents' allegations were true, the governing law and insurance policy provisions would permit coverage. The explicit wording of the insurance policy provides coverage for any "accident" occurring "as the unforeseen result of an intentional act." In other words, *unforeseen* outcomes are covered even if the conduct is intentional, let alone if the conduct is reckless.

(iii) The District Court's Decision To Abstain

Exxon filed a motion to dismiss the complaint in the New York Action on several grounds, including abstention due to the pendency of the prior, virtually identical Texas Action. The district court adopted Exxon's abstention argument and dismissed the complaint. In its abstention analysis, the district court, as was required under Second Circuit precedent, applied the "exceptional circumstances" test of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), as supplemented by *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983).[2] The district court found the third factor — the danger of piecemeal litigation — to "be by far the most significant." (D13).

In addressing the fifth *Colorado River* factor (applicable law), the district court held that "[t]he heart of this matter is a dispute over an insurance policy which is governed primarily by state law." (D7). The district court found that the federal issues identified by respondents as possible defenses to the claim — the allegedly preclusive effect of federal law on certain Alaska statutes and issues allegedly involving the Federal Arbitration Act — did not override the danger of piecemeal litigation. The district court concluded that "[t]he core and bulk of this action involves the application of state law in a context where the states have a

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[2] *Colorado River* abstention turns on a balancing of six factors: (1) whether either the state or federal court has assumed jurisdiction over a *res*; (2) the relative inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the actions were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state action will protect the federal plaintiffs' rights. *Moses H. Cone*, 460 U.S. at 23, 26 (announcing factors five and six); *Colorado River*, 424 U.S. at 818 (announcing factors one through four).

strong interest in seeing their law applied. In such circumstances, the presence of a federal law issue in a small portion of the overall dispute does not carry the weight described in *Moses H. Cone*." (D9). Accordingly, the district court stated that "factor five militates toward abstention, but only slightly." *Id*. The district court held that the remaining factors were either neutral or weighed slightly in favor of abstention.

(iv) The Second Circuit's First Opinion

On February 21, 1995, the Second Circuit reversed. Although the court of appeals reviewed the district court's decision under an "abuse of discretion" standard, it "scrutinize[d] the legal issues underlying that decision *de novo*." (C7).[3] The Second Circuit held that, despite the pendency of the Texas Action, the district court erred by abstaining from exercising jurisdiction over the New York Action. (C3, C18). Referring to the six *Colorado River* factors, the Second Circuit noted that "[n]ot all factors are created equal" and that "[a] court will accord greater weight to those factors that bear more significantly on the case, and should thumb the scale in favor of exercising jurisdiction." (C7).

Although the Second Circuit addressed all six factors, it reversed principally on the ground that the fifth factor, the source of the rule of decision, "heavily tilt[ed] against abstention." (C7). Despite this Court's statement that the fifth factor has "less significance" where, as here, the federal courts have concurrent jurisdiction with the state courts (*Moses H. Cone*, 460 U.S. at 25), the court of appeals held

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[3] In *Wilton* v. *Seven Falls Co.*, 515 U.S. _____, 115 S. Ct. 2137 (1995), decided after the Second Circuit's first reversal, this Court held that a district court's decision to dismiss or stay an action under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*. was reviewable under an "abuse of discretion" standard.

that an unsettled issue of "first impression" under federal admiralty law, namely, whether an insured that acts recklessly is permitted to obtain insurance coverage for its losses, was "truly a brooding omnipresence" and "all but demand[ed] that the federal court hear the case." (C12, C17). Even though the standard of fortuity was not an issue on appeal, the Second Circuit stated that "[w]hile negligent losses are fortuitous, and wilful ones are not, admiralty courts have yet to assign losses caused by the insured's own reckless conduct to either camp." (C10). The Second Circuit found this Court's "hallmark" decision in *Orient Insurance Co.* v. *Adams*, 123 U.S. 67 (1887), "equivocal as to the precise issue of whether a marine insurer is liable under a policy for losses caused by an insured's recklessness." (C11). The Second Circuit confirmed that there was a risk of piecemeal litigation but found that the "possible annoyance that piecemeal litigation may cause here hardly offsets the commanding presence of a federal question of first impression." (C16).

(v) This Court Vacates the Second Circuit's Decision

On May 13, 1995, Exxon petitioned this Court for a writ of certiorari. Exxon's petition presented two questions: (1) whether federal maritime law or state law provides the rule of decision in a marine insurance coverage dispute when the court (a) determines that there is no federal precedent on point, and (b) does not determine that there is any need for a federal uniform rule, and (2) whether a district court's discretion to dismiss an insurer's federal declaratory judgment action, in deference to a policyholder's pending state court action raising the same issues, is governed by the six-factor test announced in *Colorado River* and *Moses H. Cone*, or by the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, as construed by this Court in *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942). On October 2, 1995, this Court granted certiorari, vacated the

Second Circuit's decision, and remanded the case for further consideration in light of *Wilton* v. *Seven Falls Co.*, 515 U.S. _____, 115 S. Ct. 2137 (1995). The Court thus did not address the first question.

(vi) The Texas Action Proceeds to Trial

The Texas Action currently is scheduled for trial beginning April 9, 1996.[4] The discovery has been voluminous, involving hundreds of thousands of documents and in excess of 50 witness depositions. The Texas court has appointed a Special Master, who has made rulings with respect to claims of privilege involving several thousand documents. A number of important motions are *sub judice* before the court in Texas. The Texas court has denied respondents' motion on the "fortuity" issue which is discussed in the Second Circuit's two opinions, but has reserved decision on Exxon's motion on that issue.

In contrast, no substantive action has been taken in the New York proceeding since Exxon answered the complaint.

(vii) The Second Circuit's Opinion on Remand

On January 12, 1996, after receiving letter briefs from the parties on the applicability of *Wilton* and the status of the Texas Action, the Second Circuit adhered to its original decision.

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[4] Respondents — unsuccessfully — have sought removal of the Texas Action to federal court in Texas three times. Their latest attempt, just weeks before trial, was rejected by the federal district court in Texas on March 13, 1996. *Exxon Corp.* v. *Certain Underwriters at Lloyd's of London*, Civ. A. No. H-96-0666 slip op. at 3 (S.D.Tex. Mar. 15, 1996) (remanding case, observing that "the state court is likely to proceed on the legal issues in this case by applying state law governing marine insurance").

Despite the fact that the Texas Action was scheduled for trial in a matter of weeks and the New York Action remained dormant, the court of appeals saw "no need to disturb [its] initial decision" because, "[e]ven when made under the more discretionary *Brillhart* doctrine, a decision to abstain in this case would constitute an abuse of discretion in light of the important federal question presented." (A3). The court of appeals reiterated its prior determination that the issue of whether "maritime losses caused by an insured's recklessness are fortuitous [ ] 'is a novel issue of federal admiralty law' that 'is truly a brooding omnipresence.'" (A7, quoting *Youell* v. *Exxon Corp.*, 48 F.3d at 114 (C17).)

The Second Circuit further determined that the federal court should resolve the standard of fortuity under federal maritime law because the resolution of "novel questions of federal [admiralty] law . . . is quintessentially [a federal court's] obligation." (A7). The court of appeals refused to remand the case to the district court to allow that court to exercise its discretion under the Act, stating:

> Were we to remand this case for the district court to apply an abstention analysis employing its broader discretion under *Brillhart*, we assume that it would again abstain in deference to the Texas litigation. Nonetheless, we would review that decision for an abuse of discretion. . . . And, based on the novel federal admiralty question presented in this case, we would again hold that a decision to dismiss the Underwriters' declaratory judgment action constituted an abuse of that discretion. Thus, because a remand would be pointless, we reverse the district court's judgment of dismissal, and reinstate the declaratory judgment action.

(A7-A8) (*citation omitted*).

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's Refusal To Permit the District Court To Exercise Its Discretion Under the Declaratory Judgment Act Ignores This Court's Decision in *Wilton* and Merits Summary Reversal.

It is always inappropriate for a lower court to refuse to follow a decision of this Court, but such disobedience is particularly inappropriate when this Court has specifically ordered the lower court to reconsider a prior ruling in light of the relevant decision. This Court lacks the resources to decide every case that comes before it, and thus it exerts its influence by announcing the general principles that apply in a broad range of cases. For the system to work, the lower courts must conscientiously apply these general principles and this Court's specific orders in particular cases. The Second Circuit's flat disobedience of this Court's mandate to apply *Wilton* v. *Seven Falls Co.*, 515 U.S.___, 115 S.Ct. 2137 (1995), thus justifies summary reversal.

A. This Court's Decision in *Wilton*

This Court in *Wilton* held that a district court's discretion to withhold declaratory relief when a parallel state court proceeding is or might be pending is governed by the broad standard set forth in *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942), rather than the more stringent "exceptional" circumstances test of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976).

In *Wilton*, insurers commenced a federal declaratory judgment action seeking a declaration of noncoverage under certain insurance policies. Shortly thereafter, the insured

commenced a state court action to resolve the coverage questions. The insured also sought dismissal of the federal declaratory judgment action. The Fifth Circuit affirmed a stay of the federal action pending resolution of the state action, and this Court affirmed. The Court held that "*Brillhart* makes clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton*, 115 S. Ct. at 2140. Recognizing the "unique and substantial discretion in deciding whether to declare the rights of litigants" under the Act, *Wilton*, 115 S. Ct. at 2142, the Court noted that "[t]he statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface." *Id.* Moreover, consistent with the breadth of this discretion, the Court found that a district court's exercise of discretion under the Act was reviewable under an "abuse of discretion" standard:

> We believe it more consistent with the statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are particularly within their grasp.

Wilton, 115 S. Ct. at 2144. *See also Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978) (observing that, under *Brillhart*, "the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion."); *Stewart Title Guar. Co.* v. *Cradle Co.*, 74 F.3d 835, 837 (7th Cir. 1996) ("[d]istrict courts are better suited to make the particular factual findings necessary to determine the propriety of a declaratory judgment action, and because of this they have

specifically been vested with the discretion to make such judgments") (citing *Wilton*).

B. The Second Circuit Failed To Follow *Wilton*.

The Second Circuit's decision flies in the face of this Court's clear holding in *Wilton*. This Court vacated the Second Circuit's first opinion and explicitly remanded the case for further proceedings in light of *Wilton*. But the Second Circuit responded by disregarding this Court's mandate, adhering to its previous decision, and refusing to permit the district court to exercise its discretion under the Act, as contemplated by *Wilton*. The Second Circuit found that any decision by the district court to defer to the Texas Action — which goes to trial on April 9, 1996 — would *necessarily* be an abuse of discretion. The Second Circuit stated curtly that it was well aware of the grant of certiorari in *Wilton* when it rendered its first decision, but that "the instant case was 'fundamentally distinct from *Wilton*,'" and that, even under *Wilton*, the district court was *bound* to hear the case. (A7; C7 n.2).

Contrary to the Second Circuit's reading of *Wilton*, district courts under the *Brillhart* standard are not *bound* to adjudicate any particular type of case; rather, district courts should be allowed to exercise their broad discretion whether to issue declaratory relief in a free and unfettered manner. *Wilton*, 115 S. Ct. at 2144 (noting that it is "more consistent with statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp").

The Second Circuit's steadfast adherence to its reversal of the district court's dismissal and its refusal to

remand the case to the district court is a wilful failure to follow this Court's binding precedent.

1. The Second Circuit's Decision Deprives District Courts of the "Unique and Substantial Discretion" To Determine Whether and When To Entertain a Declaratory Judgment Action.

The Second Circuit's ruling that the presence of a "novel question of federal admiralty law" precludes a stay or dismissal under the Act as a matter of law is contrary to the "unique and substantial" discretion vested in the district courts under the Act. *Wilton*, 115 S. Ct. at 2142. As *Wilton* and *Brillhart* recognize, district courts are best suited to determine whether a federal declaratory judgment action should be stayed pending resolution of the same issues between virtually identical parties in a state court action. By laying down a *rule* that the resolution of certain issues is a "quintessential" obligation of federal courts, and that any decision to stay resolution of such issues necessarily would constitute an "abuse of discretion," the court of appeals' decision deprives district courts of discretion under the Act where, as here, the issue can be resolved and is on the verge of being resolved by a state court exercising its concurrent jurisdiction over admiralty matters under the saving to suitors clause. *See* 28 U.S.C. § 1333(1).

In *Wilton*, this Court stated that it was not "delineat[ing] the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings." *Wilton*, 115 S. Ct. at 2144. But this Court did make clear that, even in cases involving federal law, district courts have discretion under *Brillhart* whether to entertain an action under the Act. The Second Circuit held to the contrary, ruling that in declaratory judgment cases raising "novel" or "important"

issues of federal law,[5] district courts may *never* stay or dismiss an action without abusing their discretion; in other words, district courts have no discretion at all. This extraordinary result is inconsistent with the "discretion" afforded to district courts under the Act and contrary to the rule of *Wilton*.

Put another way, the Second Circuit's characterization of certain questions as "quintessential" obligations of federal courts is nothing more than saying that district courts have an "unflagging obligation" to hear certain types of cases. *Colorado River*, 424 U.S. at 817. *Wilton* explicitly rejected that *Colorado River* test. Post-*Wilton* decisions in other circuits also have rejected the approach counselled by *Colorado River* and have stayed declaratory judgment actions involving federal issues where state courts are competent to adjudicate those issues. *See, e.g.*, *Int'l Ass'n of Entrepreneurs of Am.* v. *Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995) (post-*Wilton* stay of federal declaratory judgment action filed in response to state court action raising ERISA issues; state court with concurrent jurisdiction was capable of resolving those issues.); *see also Fuller* v. *Ulland*, 76 F.3d 957, 960 (8th Cir. 1996) (affirming abstention under *Younger* doctrine because under theory of concurrent jurisdiction "the state court is competent to decide the threshold issue of ERISA status.").[6]

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[5] The Second Circuit also erred in concluding that such an issue is present in this case. *See infra*, 15 n.7.

[6] The existence of federal law issues does not require that discretion under the *Brillhart* analysis or the Act be exercised against a stay or dismissal in favor of a pending state court action. For example, in *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), this Court held that a district court's discretionary stay of a federal action raising issues under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder was not erroneous where a state court action was pending. As Justice Rehnquist stated, the "decision [to exercise its

2. The Second Circuit's Attempt to Distinguish *Wilton* on the Ground That This Case Raises a Novel Issue of Federal Admiralty Law Disregards the Congressional Intent and This Court's Precedent Permitting a Plaintiff To Choose the Forum in Admiralty Cases.

The Second Circuit purported to distinguish *Wilton* on the ground that this case raises a novel issue of federal admiralty law.[7] (A7; C17). On the basis of this supposed

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discretion under the Act] in such circumstances is largely committed to the discretion of the district court. Furthermore, *Colorado River* established that such deference may be equally appropriate even when matters of substantive federal law are involved in the case." *Id.* at 664 (*citations omitted*).

[7] In truth, this case does not raise a novel issue of federal admiralty law, as Exxon explained more fully in the initial Petition for a Writ of Certiorari, *Exxon* v. *Youell*, No. 94-1871 (filed May 12, 1995), at 7-17.

Under *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), state law presumptively governs marine insurance disputes absent a "judicially established" maritime principle on point or the need for a federal court to fashion such a rule. 348 U.S. at 314. If the court below is correct in saying that the fortuity standard presents an issue of "first impression" in federal maritime law (C12), it follows that there is no "judicially established" maritime principle on point. The Second Circuit never made any effort to determine whether this particular marine insurance issue required a uniform federal rule. Applying *Wilburn Boat*, the Second Circuit should have held that state law applies to the fortuity question. Even the respondents, in recent pleadings in the Texas Action, implicitly concede that the Second Circuit erred: "[I]n the absence of established federal precedent, courts should apply state law in marine insurance disputes.... Thus, the court may resort to a state law analysis of issues that have not yet been decided under federal admiralty law." Underwriters' Motion for Partial Summary Judgment on Exxon's Section IIIA Claims, dated March 18, 1996, p. 9, n.6.

distinction, the court of appeals proceeded to its decision that the district court in New York *must* hear this case.

The Second Circuit's result-oriented conclusion is nothing more than a subjective and insupportable judgment that the Texas state courts are ill-equipped to adjudicate "novel" or "important" issues of federal admiralty law. This distrust of state courts undermines the balance between the federal and state courts and is an inappropriate basis upon which to deny the district court discretion to defer to the first-filed state court action. *See, e.g.*, *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 150 (1988) (Texas courts "are presumed competent to resolve federal issues"); *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 15-16 (1987) (rejecting arguments that Texas courts could not protect litigants' federal rights); *Amalgamated Clothing Workers of Am.* v. *Richman Bros.*, 348 U.S. 511, 518 (1955) (referring to "continuing evidence of confidence in the state courts" to enforce federal rights).

In admiralty cases in particular, such distrust flies in the face of Congressional intent expressed in the saving to suitors clause, 28 U.S.C. § 1333(1), which preserves a plaintiff's option to bring a maritime case in state court (if the state court otherwise has jurisdiction). Congress has thus determined that state courts are competent to answer federal admiralty law questions, and accordingly maritime issues can and should be resolved by the state courts if the plaintiff

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Furthermore, the Second Circuit is also wrong in concluding that the fortuity standard presents an issue of first impression in federal maritime law. The standard was established in *Orient Insurance Co.* v. *Adams*, 123 U.S. 67 (1887), which held that misconduct (including reckless misconduct) is "fortuitous" and can be covered by insurance unless affected by "fraud or design." *Orient*, 123 U.S. at 73. *See also* Petition for a Writ of Certiorari, *Exxon* v. *Youell*, No. 94-1871 (filed May 12, 1995), at 13-14 & n.10.

chooses to bring suit there. *See also Exxon Corp.* v. *Certain Underwriters at Lloyd's of London*, Civ. A. No. H-96-0666 slip op. at 3 (S.D.Tex. Mar. 15, 1996) ("[i]n the event that the [fortuity] issue is decided in federal court prior to a state court decision on the same issue, the state court has full authority to apply the relevant federal law.").

The Second Circuit's determination that admiralty issues of "first impression" "all but demand" a federal forum for resolution also is at odds with this Court's rationale in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959). Referring to the saving to suitors clause, the *Romero* Court stressed the importance of preserving the state forum to resolve maritime disputes.[8] As Justice Frankfurter explained, "[b]y making maritime cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters — a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve." *Romero*, 358 U.S. at 372. *See also, e.g., Servis* v. *Hiller Sys., Inc.*, 54 F.3d 203, 206 (4th Cir. 1995) ("Section 1333's 'saving to suitors' clause preserves a maritime suitor's election to pursue common-law remedies in state court.").

The Second Circuit's decision directly undermines this Court's recognition that maritime rights can — indeed, should — be enforced in the state courts when the plaintiff files suit there. If, under *Brillhart*, an insurance dispute is better resolved in a pending state forum when the plaintiff files suit there rather than in a later-filed federal declaratory judgment action, the mere fact that one aspect of the insurance coverage dispute implicates a "novel" issue of maritime law

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[8] The relevant issue in *Romero* was whether general maritime law provided federal question jurisdiction. If it did, maritime cases in state court would be freely removable — thus undermining the "saving to suitors" clause. *See* Steven F. Friedell, 1 *Benedict on Admiralty* § 122 at 8-6 (6th ed. 1994).

is not a sufficient reason to adjudicate the dispute in federal court and effectively "remove" the dispute to the federal courts. This is precisely the effect of the Second Circuit's decision.

C. The Second Circuit's Failure To Follow *Wilton* Justifies Summary Reversal.

The Second Circuit has blatantly "departed from the accepted and usual course of judicial proceedings" so "as to call for an exercise of this Court's supervisory power," Sup. Ct. Rule 10(a); *see also* Sup. Ct. Rule 10(c) (recognizing that a circuit decision that "conflicts with relevant decisions of this Court" is a proper subject for a writ of certiorari). In these circumstances, the entry of a summary reversal order is warranted. *See, e.g., United States* v. *Nachtigal*, 507 U.S. 1, 4 (1993) (summarily reversing decision of Ninth Circuit Court of Appeals that failed to "routine[ly] appl[y] . . . the rule announced in [this Court's recent decision in] *Blanton* [v. *North Las Vegas*]."); Robert L. Stern, et. al., *Supreme Court Practice*, § 5.12 (7th ed. 1993) (noting that summary disposition is authorized "to correct clearly erroneous decisions of lower courts" and observing that "[e]xamples [of summary reversal orders] from the past include perceived failures of lower courts to heed Court precedents...").

The present case in remarkably similar to *Hutto* v. *Davis*, 445 U.S. 947 (1980). The first time that case came before this Court, certiorari was granted, the decision below was vacated, and the case was remanded for further consideration in light of *Rummel* v. *Estelle*, 445 U.S. 263 (1980). On remand, the lower court reaffirmed its earlier decision. When a second petition for certiorari was filed, this Court summarily reversed. *Hutto* v. *Davis*, 454 U.S. 370 (1982) (*per curiam*). Explaining its decision, the Court stated:

> [T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously,

> the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

454 U.S. at 374-375. Presumably, this same rationale has motivated the Court on the other occasions when it has summarily reversed a decision reaffirming a prior judgment following a "GVR." *See*, *e.g.*, *Powell* v. *Texas*, 492 U.S. 680 (1989) (*per curiam*); *Immigration & Naturalization Service* v. *Miranda*, 459 U.S. 14 (1982) (*per curiam*); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) (*per curiam*); *Fontaine* v. *California*, 390 U.S. 593 (1968) (*per curiam*); *O'Connor* v. *Ohio*, 385 U.S. 92 (1966) (*per curiam*); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964) (*per curiam*).

II.

The Second Circuit's Refusal To Permit the District Court To Exercise Its Discretion Under the Declaratory Judgment Act Encourages Forum Shopping and Wasteful and Duplicative Litigation, and Its Finding That a Remand was "Pointless" was an Incorrect Application of the *Brillhart* Standard.

If this Court does not summarily reverse the decision below, the Second Circuit's failure to heed *Wilton* should be subject to plenary review on the merits.

A. The Second Circuit's Decision Will Encourage Concurrent and Inefficient Litigation in Two Fora, Create Opportunities for Forum Shopping, and Increase the Risk of Tensions Between the State and Federal Courts.

This case involves a first-filed state court action, commenced in the insured's home state, and a subsequent declaratory judgment action designed solely for forum shopping. The Second Circuit was aware that a trial date in April 1996 had been set in the state court and that discovery and motion practice in the state court were far advanced. The Second Circuit nevertheless required duplicative proceedings in the federal court to go forward, based on an analysis that undermines this Court's decision in *Wilton* and encourages forum shopping and wasteful and duplicative litigation.

The Second Circuit's decision that a district court *necessarily* abuses its discretion if it stays or dismisses a federal declaratory judgment action that involves a "novel" or "important" issue of federal law substantially undermines *Wilton*'s holding that district courts should avoid costly, inefficient, and duplicative litigation practices. Under the

Second Circuit's interpretation of *Wilton*, the mere presence of an alleged "important," "unsettled," or "novel" issue of federal law (A7), will permit a declaratory judgment plaintiff to forum shop and engage in wasteful and duplicative litigation. This Court has repeatedly discouraged such practices. *See, e.g.*, *Brillhart*, 316 U.S. at 495 ("[o]rdinarily it [is] vexatious for a federal court to proceed in a declaratory judgment suit where another suit [presenting the same issues] is pending in a state court."); *Will*, 437 U.S. at 663.

Furthermore, encouraging federal and state courts to resolve identical issues concurrently will increase the risk that those courts will issue conflicting rulings. This may have serious repercussions for comity between the state and federal courts. For example, permitting — indeed, encouraging — a federal court to issue interpretations of state insurance law while a state court concurrently interprets and applies state law could lead to unnecessary and undesirable conflict.

Finally, a consequence of the Second Circuit's ruling is that a determination of whether a district court abused its discretion will turn on factors that have little to do with whether there will be duplicative and inefficient concurrent litigation between the parties. Rather, that determination will turn on whether the issue before the district court was sufficiently "novel" or "important." This conclusion is directly at odds with the pragmatic and practical reasoning of *Wilton* that focuses on the pernicious and undesirable effect of duplicative concurrent litigation.

B. The Second Circuit's Conclusion that a Remand Would Be "Pointless" was Wrong Because Application of the Discretionary Factors in *Brillhart* Supports the District Court's Dismissal.

The Second Circuit explicitly addressed the possibility of remanding this case to the district court, but concluded that a "remand would be pointless." (A7-A8). Contrary to the court of appeals' assertion that a decision to dismiss this

action would necessarily be an abuse of discretion, the *Brillhart* discretionary factors strongly *support* the district court's dismissal. In *Brillhart*, the Court set forth a number of considerations for discretionary abstention:

> Where a District Court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc. We do not now attempt a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a District Court's discretion.

316 U.S. at 495; *see also Wilton*, 115 S. Ct. at 2140-41 (*quoting Brillhart*).

In this case, application of these factors supports the district court's dismissal. The district court found (and the Second Circuit confirmed) that the "scope of the pending state court [action] and the nature of defenses [offered] there" (*Brillhart*, 316 U.S. at 495) are identical to the New York

Action. (C16; D11). It also is clear that "claims of all parties in interest can be adjudicated in [the Texas Action.]".[9]

The district court further found that the Underwriters' use of the declaratory judgment remedy to gain a procedural advantage and pre-empt the plaintiff's choice of forum was inappropriate. (D12). This finding, too, supports dismissal under *Brillhart*. *See, e.g.*, *Will*, 437 U.S. at 663; *Int'l Ass'n of Entrepreneurs of Am.*, 58 F.3d at 1270 (affirming district court's decision to decline declaratory relief where declaratory judgment is "used either for tactical advantage by litigants or to open a new portal of entry to federal court for suits that are essentially defensive or reactive to state actions.").

The Underwriters' use of a declaratory judgment action as a retaliatory tactic is an abuse of that remedy. In his seminal treatise *Declaratory Judgments*, Professor Edwin Borchard[10] identified the circumstances in which insurers

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[9] After this Court's October 2 vacatur, Richard Youell, the lead underwriter and named plaintiff in the New York Action, publicly asserted that "[t]he dispute between insurers and Exxon will be resolved in the District Court of Harris County, Texas where the case has alternative trial settings in January, April and August of 1996." (Letter to the Editor, *Lloyd's List*, October 10, 1995). Mr. Youell further stated that "[t]he Texas litigation will not be affected by whatever the Court of Appeals does because the issue has nothing to do with the merits of the dispute between the parties" and "Underwriters plan to try the case in Texas." *Id.*

[10] In *Wilton*, this Court found Professor Borchard's analysis to be particularly helpful. *Wilton*, 115 S. Ct. at 2143 ("We agree, for all practical purposes, with Professor Borchard, who observed half a century ago that '[t]here is . . . nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court' to hear a declaratory judgment action."). *(Citation omitted).* Although Professor Borchard discussed a number of situations where it would be appropriate for insurers to seek a declaratory judgment on coverage issues, Borchard, *Declaratory Judgments*, *supra*, at 645-55, he explicitly stated that courts

and insureds would find it appropriate to obtain declaratory relief. *See* Edwin Borchard, *Declaratory Judgments* at 634-80 (2d ed. 1941) (Chapter VI of Part III entitled "Written Instruments — Insurance Policies"). Nowhere in his detailed treatise does Professor Borchard suggest the desirability of granting declaratory relief to an insurer after a loss has occurred and the insured has commenced a coercive action seeking insurance coverage in state court. *See also* Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L.R. 677, 683 (1942) ("if such [state court] suit involves the identical issues and complete justice can be done to all parties, including the insurer, by leaving the matter to the state courts, there seems no reason to accept for trial a subsequently brought federal suit on the issue of coverage.").

The Second Circuit's decision precludes the district court from considering the relevance of the factors Professor Borchard identifies, and the weight to be accorded to each, in the context of the overall insurance dispute between Exxon and its insurers.

There are other important issues besides "fortuity" in this dispute between Exxon and its insurers. Such issues include: whether certain policy provisions are ambiguous and the legal effect of those provisions; whether the insurance brokers are agents of the insured or insurers; whether Exxon and its subsidiary Exxon Shipping Company should be treated as separate insureds; and whether the insurers acted in bad faith and are liable under the Texas Insurance Code. *State law* will govern these other issues. However, the Second Circuit's decision treats the existence of these other important issues (which will be resolved in the Texas Action) as wholly

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correctly refuse to exercise federal declaratory judgment jurisdiction where, as here, there is a state court coverage action pending between the parties. *Id.* at 653.

unimportant. By elevating the "fortuity" issue above all other issues in the case, the Second Circuit's ruling encourages duplicative and inefficient litigation of Exxon's coverage dispute in two fora. Significantly, the "fortuity" issue already has been exhaustively briefed and argued in the Texas Action. The Second Circuit's continued insistence that a federal district court in New York also address that issue constitutes precisely the type of duplicative and inefficient litigation discouraged by *Wilton* and *Brillhart*.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted,

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Dated: New York, New York
April 8, 1996

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit dated January 12, 1996

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 848 - August Term, 1994

(Vacated: October 2, 1995

Decided: January 12, 1996)

Docket No. 94-7691

JOHN RICHARD LUDBROOKE YOUELL, an underwriter at Lloyd's London for himself and as a representative of those other Underwriters at Lloyd's London severally subscribing to certain Global Corporate Excess Insuring Agreements at issue and the following London Market Insurance Companies and other international Underwriting entities, also severally subscribing to the Insuring Agreements at issue, each on their own behalf and not for the other; *et al.*,

Plaintiffs-Appellants,

-v-

EXXON CORPORATION,

Defendant-Appellee.

Before:

MAHONEY, McLAUGHLIN, and HEANEY,[1]
Circuit Judges.

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[1] Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

In *Youell* v. *Exxon Corp.*, 48 F.3d 105 (2d Cir. 1955), we held that the "exceptional circumstances" test developed in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), governs a district court's decision to dismiss a federal declaratory judgment action in deference to parallel state proceedings. *See Youell*, 48 F.3d at 108-09. Subsequently, in an unrelated case, the United States Supreme Court held that a district court's abstention decision in declaratory judgment actions is governed by the discretionary standard of *Brillhart* v. *Excess Insurance Co.*, 316 U.S. 491 (1942), not by the *Colorado River-Moses H. Cone* test. *See Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137 (1955). The Supreme Court then vacated our judgment in *Youell*, and remanded the case to us for reconsideration in light of *Wilton*. *See Exxon Corp.* v. *Youell*, 116 S. Ct. 43 (1995) (mem.).

We once again reverse the district court's judgment of dismissal, and reinstate the declaratory judgment action.

REVERSED.

PER CURIAM:

In *Youell v. Exxon Corp.*, 48 F.3d 105 (2d Cir.1995), we reversed the district court's dismissal of an action brought by the insurers for Exxon Corporation (the "Underwriters") against Exxon Corporation ("Exxon"), seeking a declaratory judgment that they did not have to reimburse Exxon for certain losses incurred when its oil tanker, the Exxon Valdez, was wrecked. Driven primarily by the important federal question at issue in this case, we held that, under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H.*

Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the district court abused its discretion by dismissing the declaratory judgment action in deference to the Texas state court proceeding; we therefore reinstated the Underwriters' declaratory judgment suit. See *Youell*, 48 F.3d at 114.

Two months after our decision in *Youell*, the United States Supreme Court decided *Wilton v. Seven Falls Co.*, --- U.S. ----, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). In *Wilton*, the Court held that a district court's decision to stay or dismiss a declaratory judgment action in deference to a parallel state court proceeding is governed by the discretionary standard set forth in *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), rather than the "exceptional circumstances" test developed in *Colorado River-Moses H. Cone*. *See Wilton*, --- U.S. at ----, 115 S.Ct. at 2144.

Exxon, relying on *Wilton*, petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted certiorari, and vacated *Youell*, remanding the case to us for reconsideration in light of Wilton. See *Exxon Corp. v. Youell*, --- U.S. ----, 116 S.Ct. 43, 133 L.Ed.2d 9 (1995) (mem.).

On remand from the Supreme Court, we once again reverse the district court's dismissal of the Underwriters' declaratory judgment action. Even when made under the more discretionary *Brillhart* doctrine, a decision to abstain in this case would constitute an abuse of discretion in light of the important federal question presented.

BACKGROUND

We briefly summarize the facts below. A more detailed account appears in our initial opinion. *See Youell*, 48 F.3d at 107-08.

The Underwriters subscribed to a series of Global Corporate Excess insurance agreements (collectively, the "Agreement") with Exxon covering the period from November 1988 through October 1989. The Agreement insured Exxon and some of its subsidiaries against certain risks incurred during their global activities.

In March 1989, while skippered by Captain Joseph Hazelwood, the *Exxon Valdez* ran aground near Valdez, Alaska and spilled 10.8 million gallons of oil into Prince William Sound. Having suffered prodigious losses as a result of the mishap, Exxon sought reimbursement of some $2 billion from the Underwriters under the Agreement. Believing that Hazelwood was drunk at the time of the grounding and that Exxon knew he was an alcoholic, the Underwriters denied Exxon coverage.

Exxon sued the Underwriters in a Texas state court, alleging that they had breached the Agreement and the covenant of good faith and fair dealing, and had also violated Texas insurance law. The Underwriters, in turn, filed their own suit against Exxon in the United States District Court for the Southern District of New York (Loretta A. Preska, Judge), seeking a declaratory judgment that they were not liable to Exxon. Invoking the *Colorado River-Moses H. Cone* abstention doctrine, the district court dismissed the Underwriters' action, finding that exceptional circumstances warranted deference to the Texas state proceedings. *See Youell v. Exxon Corp.*, 1994 WL 376068 (S.D.N.Y. July 19, 1994). We reversed, holding that because of the important federal question presented, it was an abuse of discretion under *Colorado River-Moses H. Cone* for the district court to abstain. *See Youell*, 48 F.3d at 114.

Upon Exxon's petition, the Supreme Court granted certiorari, vacated our judgment, and remanded with instructions to reconsider our opinion in light of *Wilton*. *See Exxon Corp.*, --- U.S. at ----, 116 S.Ct. at 43. We solicited

and received letter briefs from both parties. Having reviewed them, we see no need to disturb our initial decision.

DISCUSSION

In *Wilton*, the Supreme Court resolved a clash among the circuits concerning whether a district court's decision to dismiss a federal declaratory judgment action in favor of parallel state litigation is governed by the discretionary standard of *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), or the "exceptional circumstances" test set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The Supreme Court endorsed the *Brillhart* test, finding that "[d]istinct features of the Declaratory Judgment Act ... justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the 'exceptional circumstances' test of *Colorado River* and *Moses H. Cone*." *Wilton*, --- U.S. at ----, 115 S.Ct. at 2142. In so holding, the Court overturned precedent in this and other circuits. *See, e.g., Lumbermens Mut. Casualty Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411, 413 (2d Cir.1986); *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374 n. 3 (8th Cir.1994).

On remand, therefore, we consider afresh whether application of the more discretionary *Brillhart* test alters our initial decision to reinstate the Underwriters' declaratory judgment action. We conclude that it does not.

Under *Colorado River-Moses H. Cone* abstention, a district court may decline to exercise jurisdiction over a case only under exceptional circumstances that relate to federal-state comity. See *Wilton*, --- U.S. at ---- - ----, 115 S.Ct. at 2141-42. The *Brillhart* abstention doctrine, on the

other hand--now clearly applicable to declaratory judgment actions such as the one before us--gives the district court broader discretion to determine "whether and when to entertain an action ..., even when the suit otherwise satisfies subject matter jurisdictional prerequisites." Id. at ----, 115 S.Ct. at 2140. Hence, under *Brillhart*, the question for a district court presented with a declaratory judgment suit, is " 'whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court.' " Id. (quoting *Brillhart*, 316 U.S. at 495, 62 S.Ct. at 1176).

Although *Brillhart* did not exhaustively catalog the factors governing a district court's exercise of its discretion to hear a declaratory judgment suit, "it did provide some useful guidance in that regard." Id. For example, in determining whether the claims before it "can better be settled" in the state proceedings, the district court should examine the scope of the parallel state litigation and the nature of the defenses available there. *Brillhart*, 316 U.S. at 495, 62 S.Ct. at 1176. It should also consider "whether the claims of all parties in interest can satisfactorily be adjudicated in that [state] proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." Id.

Though *Brillhart* left the exact contours of a district court's discretion to be molded by future cases, it "indicated that, at least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in '[g]ratuitous interference,' if it permitted the federal declaratory action to proceed." *Wilton*, --- U.S. at ----, 115 S.Ct. at 2141 (quoting *Brillhart*, 316 U.S. at 495, 62 S.Ct. at 1176) (emphasis added). Underlying the *Brillhart* decision was the Court's concern that it was being called upon to pronounce independently upon state law. "To do

so," the Court held, "would be to disregard the limitations inherent in our appellate jurisdiction. It is not our function to find our way through a maze of [state] statutes and decisions...." *Brillhart*, 316 U.S. at 497, 62 S.Ct. at 1176.

To resolve novel questions of federal law, however, is quintessentially our obligation. We were aware that the Supreme Court had granted certiorari in *Wilton* when we filed our initial opinion. Nevertheless, we expressly noted that the instant case was "fundamentally distinct from *Wilton* because ... federal law supplies a rule of decision. *Wilton*, in contrast, involved state law only." *Youell*, 48 F.3d at 109 n.1.

We adhere to that view. The issue here--whether maritime losses caused by an insured's recklessness are fortuitous--"is a novel issue of federal admiralty law" that "is truly a brooding omnipresence." Id. at 114. Federal adjudication of this issue will not constitute "[g]ratuitous interference with the orderly and comprehensive disposition of [the] state court litigation." *Brillhart*, 316 U.S. at 495, 62 S.Ct. at 1176. Nor can this issue "better be settled" in Texas state court: "[A] federal question of first impression must all but demand that the federal court hear the case.... While we loathe wasting judicial resources, it would be worse to cede federal review of an issue of federal law merely because Exxon won the race to judgment in state court." *Youell*, 48 F.3d at 111-12, 114. Moreover, it bears emphasis that the *Wilton* Court specifically declined "to delineate the outer boundaries of [*Brillhart*] discretion in ... cases raising issues of federal law." *Wilton*, --- U.S. at ----, 115 S.Ct. at 2144.

Were we to remand this case for the district court to apply an abstention analysis employing its broader discretion under Brillhart, we assume that it would again abstain in deference to the Texas litigation. Nonetheless, we would review that decision for an abuse of discretion. See id. at

----, 115 S.Ct. at 2144. And, based on the novel federal admiralty question presented in this case, we would again hold that a decision to dismiss the Underwriters' declaratory judgment action constituted an abuse of that discretion. Thus, because a remand would be pointless, we reverse the district court's judgment of dismissal, and reinstate the declaratory judgment action.

CONCLUSION

We reverse the district court's judgment of dismissal, and reinstate the declaratory judgment action.

REVERSED.

APPENDIX B

Order of the Supreme Court of the United States dated October 2, 1995

SUPREME COURT OF THE UNITED STATES

NO. 94-1871

EXXON CORPORATION,

Petitioner,

v.

YOUELL, JOHN RICHARD, ET AL.

October 2, 1995, Decided

PRIOR HISTORY:

United States Court of Appeals for the Second Circuit.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for a writ of certiorari is granted.

The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Wilton* v. *Seven Falls Company*, 515 U.S. (1995). Justice Breyer took no part in the consideration or decision of this case.

APPENDIX C

Opinion of the United States Court of Appeals for the Second Circuit dated February 21, 1995

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 848 — August Term, 1994

(Argued: November 30, 1994

Decided: February 21, 1995)

Docket No. 94-7691

JOHN RICHARD LUDBROOKE YOUELL, an underwriter at Lloyd's London for himself and as a representative of those other Underwriters at Lloyd's London severally subscribing to certain Global Corporate Excess Insuring Agreements at issue and the following London Market Insurance Companies and other international Underwriting entities, also severally subscribing to the Insuring Agreements at issue, each on their own behalf and not for the other; *et al.*,

Plaintiffs-Appellants,

-v-

EXXON CORPORATION,

Defendant-Appellee.

Before:

MAHONEY, McLAUGHLIN, and HEANEY,[1]
Circuit Judges.

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[1] Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

McLAUGHLIN, *Circuit Judge*:

Exxon Corporation sued its insurers (the "Underwriters") in a Texas state court, seeking reimbursement for losses and liabilities arising from the tragic grounding of its oil tanker, the *Exxon Valdez*. Though Exxon was headquartered in New York when the *Valdez* ran aground, it relocated to Texas before filing suit. The several Underwriters, with their various headquarters around the globe, doubtless feared the home-court advantage that Texas would give Exxon. So, the Underwriters filed their own suit against Exxon in the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*), seeking a declaration that they were not liable on the insurance policies.

Invoking the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), the district court dismissed the Underwriters' action. The district court concluded that abstention was appropriate because (1) a parallel action was already proceeding in Texas state court, (2) states have a strong interest in insurance regulation, and (3) the case was controlled predominantly by state law.

On appeal, the Underwriters argue that *Colorado River* abstention was improper. Because this marine insurance dispute presents a federal question of first impression, and because the dual proceedings will cause no serious adverse consequences, we agree with the Underwriters, and reverse the district court's dismissal of their complaint.

BACKGROUND

The Underwriters comprise a group of more than 100 underwriters and insurance companies, headquartered in London, New York, Scandinavia, Japan, and elsewhere. All of them subscribed to a series of Global Corporate Excess

insurance agreements (collectively, the "Agreement") with Exxon for the period from November 1988 through October 1989.

The Agreement insures Exxon and some of its subsidiaries against certain risks incurred during their worldwide activities. Specifically: Section I of the Agreement covers all physical loss or damage to the insured's own property; Section IIIA covers marine liabilities, such as fines and penalties for pollution; Section IIIB covers nonmarine liabilities, such as damage claims by third parties. Both Sections I and IIIA broadly cover losses that are "the unforeseen result of an intentional act." The Agreement also requires arbitration of claims arising under Section IIIB.

One of the subsidiaries covered by the Agreement owned the ill-starred *Exxon Valdez* oil tanker. In March 1989, the *Valdez* ran aground in a rocky shoal 25 miles south of Valdez, Alaska, and spilled 10.8 million gallons of oil into Prince William Sound. The master of the *Valdez* was Captain Joseph Hazelwood. The Underwriters allege that Hazelwood was drunk when the *Valdez* grounded, and that Exxon knew he was an alcoholic.

Exxon incurred colossal liabilities from the oil spill. Besides the damaged tanker and irreclaimable oil, Exxon faced a host of federal environmental violation charges, as well as federal and state civil claims for clean-up costs and other damages. In addition, private individuals such as commercial fishermen sued Exxon to recover for damage caused by the oil. (As of this appeal, Exxon has resolved its disputes with most of these claimants.)

In April 1989, Exxon tried to recoup some of its massive losses. It sent the Underwriters notice of its loss, and sought reimbursement for the lost oil, clean-up costs, and various liabilities to third parties. Exxon's demand exceeded $ 2 billion. The Underwriters denied coverage, claiming that

the disaster was caused by Exxon's own misconduct, *viz.*, placing a known alcoholic at the helm of the *Valdez*.

When negotiations collapsed, Exxon sued the Underwriters in Texas state court. Exxon's complaint alleged that the Underwriters had breached the Agreement and the covenant of good faith and fair dealing, and had also violated Texas insurance law. The complaint conceded that one of its insurers, Qatar National Reinsurance Company, is an instrumentality of a foreign state, and, as such, is not subject to suit in a state court. Accordingly, the complaint "release[d] and waive[d] all claims [Exxon] may have against [Qatar National] arising out of or in any way related to the [Agreement]."

Disquieted with the Texas forum, the Underwriters twice tried to remove the action to a federal court in Texas. Both attempts failed. The Underwriters also filed the present lawsuit in the United States District Court for the Southern District of New York.

Qatar National joined as a co-plaintiff; but four of the Underwriters had become insolvent (the "insolvent insurers"), and they did not join. The Underwriters' complaint sought a declaratory judgment that they were not liable to Exxon. Further, citing the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, the complaint alleged that Exxon's Section IIIB claims were subject to mandatory arbitration. Exxon agreed thereafter to arbitrate the Section IIIB claims, rendering the Underwriters' Federal Arbitration Act argument moot. Thus, only the Section I and Section IIIA claims remain in the lawsuit, both raising the same question: what insurance coverage is there for "the unforeseen result of an intentional act"?

Exxon moved to dismiss the Underwriters' complaint, claiming that the federal court lacked subject-matter jurisdiction, and, alternatively, that it should defer to the Texas

state court proceeding. The district court rejected Exxon's challenge to federal jurisdiction, holding that the dispute sounded in admiralty. Nevertheless, the court concluded that exceptional circumstances existed to warrant dismissal under *Colorado River*. Accordingly, it granted Exxon's motion, and dismissed the complaint. *See Youell v. Exxon Corp.*, 1994 WL 376068 (S.D.N.Y. July 19, 1994).

As counseled by *Colorado River*, and the subsequent case *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), the district court examined: whether either court had obtained jurisdiction over a *res*; the relative convenience of the fora; the order in which the actions were filed; the desirability of avoiding piecemeal litigation; the source of controlling law; and the state court's ability to protect the federal plaintiff's interests. Finding that the suit did not involve a *res*, and that the two fora were equally convenient, the district court eliminated these two factors. The court also noted that the Texas action was filed first, and had progressed slightly further than the federal action.

The district court then found that piecemeal litigation was particularly undesirable under the circumstances because it could lead to conflicting interpretations of the same insurance policy. The court also held that Texas law predominantly supplied the rules of decision for the dispute because states have a strong policy interest in regulating insurance and because no applicable admiralty rule existed. Finally, the district court determined that the Texas court was fully capable of protecting the Underwriters' interests.

Balancing the six factors, the district court concluded that abstention was proper under *Colorado River* and *Moses H. Cone*, and dismissed the complaint. The Underwriters now appeal. We reverse.

DISCUSSION

Abstention jurisprudence begins with the principle that federal courts have a "virtually unflagging obligation" to exercise jurisdiction over all cases properly before them. *Colorado River*, 424 U.S. at 817-18. Only under "exceptional circumstances" relating to federal-state comity may a court eschew this duty, and leave the parties to fend for themselves in state court. *Id.* at 813.

There are four "extraordinary and narrow exception[s]" to a federal court's duty to exercise jurisdiction. *Id.* A federal court may decline to hear a case: (1) that poses a federal constitutional issue that may be mooted or altered by a state court ruling on state law, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941); (2) involving complex questions of state law that bear on important state policy issues, *see Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); (3) that was filed to enjoin state court proceedings, *see, e.g., Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) (attempt to enjoin state criminal proceedings); or (4) when duplicative state court proceedings are pending, and exceptional "reasons of wise judicial administration" counsel dismissal, *Colorado River*, 424 U.S. at 817-18.

The *Pullman* abstention doctrine prevents federal courts from interpreting the Constitution where the case can be decided on alternative grounds; *Burford*, and *Younger* extricate federal courts from situations where the assertion of jurisdiction would intrude into the state courts' proper domain. Duplicative proceedings do not necessarily implicate these weighty concerns, and, thus, only "exceptional" circumstances permit *Colorado River* abstention. *Id.* at 817-18.

Whether *Colorado River* abstention is justified turns on a balancing of six factors: (1) whether either the state or federal court has assumed jurisdiction over a *res*; (2) the

relative inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the actions were filed; (5) whether state or federal law provides the rule of decision; and (6) whether the state action will protect the federal plaintiffs' rights. *De Cisneros v. Younger*, 871 F.2d 305, 307 (2d Cir. 1989). *See Moses H. Cone*, 460 U.S. at 23, 26 (1983) (announcing factors five and six); *Colorado River*, 424 U.S. at 818 (announcing factors one through four). Not all factors are created equal. A court will accord greater weight to those factors that bear more significantly on the case, and should thumb the scale in favor of exercising jurisdiction. *See Moses H. Cone*, 460 U.S. at 16.

We review the decision to abstain for abuse of discretion, but scrutinize the legal issues underlying that decision *de novo*. *See Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 48 (2d Cir.), *cert. denied*, 130 L. Ed. 2d 23, 115 S. Ct. 67 (1994).[2]

Here, one of the *Colorado River-Moses H. Cone* factors heavily tilts against abstention, two disfavor it, and three weakly support it. We will review these factors in the order of their importance.

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[2] The Supreme Court recently granted certiorari to hear argument that courts should review abstention decisions *de novo*. *See* Supreme Court Brief for Petitioner, *Wilton v. Seven Falls Co.*, 41 F.3d 934 (5th Cir.), *cert. granted*, 115 S. Ct. 571 (1994) (brief available as 1995 WL 13178). Since we find that the district court abused its discretion, *Wilton*'s decision on this issue will not change our ruling.

We also note that our case is fundamentally distinct from *Wilton* because, as discussed below, federal law supplies a rule of decision. *Wilton*, in contrast, involved state law only. *See id.*

A. *The Source of the Rule of Decision*

Of the six *Colorado River-Moses H. Cone* factors, the fifth, the source of the rule of decision, is the most prominent here because an unresolved question of federal admiralty law will profoundly affect whether the Underwriters are liable to Exxon.

It is indisputable that the presence of federal questions weighs heavily against abstention. *See Moses H. Cone*, 460 U.S. at 26 ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender."); *Colorado River*, 424 U.S. at 815 n.21 ("[T]he presence of a federal basis for jurisdiction may raise the level of justification needed for abstention."); *DeCisneros*, 871 F.2d at 308 ("When the applicable substantive law is federal, abstention is disfavored."). And, since the lawsuit here concerns a marine insurance policy, it falls within the embrace of federal admiralty law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 99 L. Ed. 337, 75 S. Ct. 368 (1955).

That admiralty jurisdiction exists does not automatically assure that the applicable law will be federal, however. Unlike other areas of admiralty law, Congress has not chosen to legislate with regard to marine insurance. *See id.* at 313-14. As a result of this lacuna, marine insurance policies are governed by state insurance regulations, unless the federal courts have fashioned an admiralty rule on point, or unless a need for such a federal rule exists. *See id.* at 314; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 98 L. Ed. 143, 74 S. Ct. 202 (1953) (where federal law provides a defense in an admiralty suit, it controls over state law); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961) ("The application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."). We must therefore determine whether the federal courts have

fashioned an applicable admiralty rule, and if not, whether one is necessary.

The plaintiffs suggest several rules that, they claim, provide defenses to marine insurance liability—among them, the rule that all-risk policies in marine insurance contracts only cover losses caused by fortuitous events (the "fortuity rule"). They argue that the fortuity rule is an admiralty rule, and that it exempts a marine insurer from having to cover losses caused by the insured's recklessness. Thus, the plaintiffs argue, if they can prove that Exxon recklessly allowed a known alcoholic to pilot the Valdez and that this recklessness caused the grounding, the fortuity rule relieves them of liability.

Exxon, for its part, recognizes the fortuity rule but disputes that the rule is federal, claiming instead that it arises under state law. Exxon also argues that, in any event, losses caused by recklessness are still fortuitous, and are therefore covered.

As an initial matter, we agree with plaintiffs that the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years. *See Orient Mut. Ins. Co. v. Adams*, 123 U.S. 67, 31 L. Ed. 63, 8 S. Ct. 68 (1887). In so doing, these courts have predominantly looked to federal law as precedent. *See, e.g., Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 431 (5th Cir. 1980) (relying on Second, Fifth, and Ninth Circuit cases); *Atlantic Lines Ltd. v. American Motorists Ins. Co.*, 547 F.2d 11, 12-13 (2d Cir. 1976) (relying on various federal district and circuit court decisions); *Western Assur. Co of Toronto v. Shaw*, 11 F.2d 495, 496 (3d Cir.) (relying on federal precedent), *cert. denied*, 273 U.S. 698, 71 L. Ed. 846, 47 S. Ct. 93 (1926). And, to the extent that admiralty courts have looked to other sources, they have relied on British as much as state case law authority. *See, e.g., Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340-41 (9th Cir. 1988) (looking to

British case law); *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040, 1042 (4th Cir. 1979) (relying on cases from Great Britain, North Carolina, and federal courts). That admiralty courts do not look exclusively to state law on the issue of fortuity indicates to us that the rule must have an independent existence in federal maritime law.

Less clear, however, is how the fortuity rule regards losses caused by the insured's own recklessness. The fortuity rule excludes from coverage losses that arise from inherent defects, wear and tear, or from the insured's wilful misconduct; losses that arise from acts of nature, or the insured's negligence, are covered. *See Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 307 (2d Cir. 1987); Grant Gilmore, Charles L. Black Jr., *The Law of Admiralty* § 2-9, at 72 (2d ed. 1975) ("What is covered is not any loss that may happen on the sea, but fortuitous losses occurring through extraordinary action of the elements at sea, or any accident or mishap in navigation.") (emphasis omitted). While negligent losses are fortuitous, and wilful ones are not, admiralty courts have yet to assign losses caused by the insured's own reckless conduct to either camp.

The concept of recklessness does not lend itself to easy characterization as either negligent or wilful conduct. Recklessness implies that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 213 (5th ed. 1984) (citations omitted). As such, recklessness falls somewhere "between intent to do harm, which . . . includes proceeding with knowledge that the harm is substantially certain to occur, and the mere unreasonable risk of harm to another involved in ordinary negligence." *Id.* at 212 (citation omitted). In other words, recklessness lies in the mists between mere negligence and wilful misconduct.

The hallmark fortuity decision is *Orient Mutual Insurance Company v. Adams*, 123 U.S. 67, 31 L. Ed. 63, 8 S. Ct. 68 (1887). In *Orient*, the master, or captain, of a steamer failed to follow a "custom of the river," and, as a consequence, his vessel was carried over falls and dashed upon a pier. The master had obtained an insurance policy upon the vessel, and sued to recover upon it.

At trial, the district judge instructed the jury that the insurer of the vessel would not be liable for damages if the ship master "designedly or recklessly exposed" the vessel to danger. *See Orient*, 123 U.S. at 72. The judge added, however, that "the [insurer] is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or [employees]." *Id.* The jury found for the insured.

On appeal to the Supreme Court, the insurer argued that the district judge should have charged that losses caused by the master's "misconduct" were also outside the realm of fortuity. *Orient* rejected the insurer's argument, stating: "the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy." *Id.* at 73. *Orient* continued that "the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself." *Id.* (citation omitted). Thus, *Orient* concluded, the jury charge was proper.

We find that *Orient* is equivocal as to the precise issue of whether a marine insurer is liable under a policy for losses caused by an insured's recklessness. *See* 123 U.S. at 72-73. On one hand, as the Underwriters point out, *Orient* affirmed the district court's jury charge that the insurer is not liable for damages that occur because the master acted "designedly or recklessly." *Id.* On the other, as Exxon notes, *Orient* also stated the insurer is liable for all losses except those caused by the master's "fraud or design." *Id.* We cannot reconcile these

two statements, for, at least, in modern legal parlance, "recklessness" is different from both fraud and design.

Admiralty cases after *Orient* similarly shed little light on the issue. For example, *Ingersoll* stated that an insurer is liable for "all losses which are fortuitous no matter what caused the loss, including the insured's negligence." *See* 829 F.2d at 307. *Ingersoll* also defined fortuity to exclude any loss caused by the insured's intentional misconduct. *See id.* Nowhere does *Ingersoll* explain what happens when the loss stems from the insured's conscious disregard of a known risk, however. Other admiralty cases discussing fortuity have likewise not addressed the point. *See, e.g., Zurich*, 838 F.2d at 340-41 (loss is fortuitous if it is "due to the sea"); *Morrison*, 632 F.2d at 431 (fortuitous losses are brought about by chance); *Goodman*, 600 F.2d at 1042 (losses caused by negligence are fortuitous; losses caused by intentional misconduct are not); *Atlantic*, 547 F.2d at 12 (mysterious loss of goods is fortuitous); *Western*, 11 F.2d at 496 (only losses caused by "abnormal causes and extraordinary occurrences" are covered by marine insurance policy).

It is clear, then, that whatever court adjudicates Exxon's insurance dispute with the Underwriters must decide, on first impression, whether losses caused by the insured's recklessness are fortuitous. This being an issue of admiralty law, a federal court should not shy away from it. Indeed, if the mere presence of a federal law issue is "a major consideration weighing against" abstention, *Moses H. Cone*, 460 U.S. at 26, *a fortiori*, a federal question of first impression must all but demand that the federal court hear the case.

B. *Undesirability of Piecemeal Litigation*

Obviously, if the federal court refuses to abstain, the inevitable result will be piecemeal litigation. Just as obviously, that result cannot command that the federal court abstain.

Considerations of sound judicial administration require a pragmatic evaluation of the relative costs and benefits of permitting parallel litigation to proceed apace. *See Colorado River*, 424 U.S. at 819.

Apart from the expense of mounting separate lawsuits in New York and Texas, the major problem in pursuing parallel litigation is the risk of inconsistent determinations. *See DeCisneros*, 871 F.2d at 308. That risk is particularly acute in insurance disputes, where the possibility of inconsistent determinations may leave the insured with insufficient coverage. *See Lumbermens Mut. Cas. Co. v. The Connecticut Bank & Trust Co.*, 806 F.2d 411, 414-15 (2d Cir. 1986). This problem is largely dissipated, however, when it is recalled that a judgment by either a federal or a state court will ordinarily be res judicata in the other. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567, 77 L. Ed. 2d 837, 103 S. Ct. 3201 (1983); *Milltex Indus. Corp. v. Jacquard Lace Co.*, 922 F.2d 164, 166 (2d Cir. 1991).

True, because they are not parties to both suits, res judicata may not apply to the four insolvent insurers or to Qatar National. These loose ends, although conceptually discomfiting, are of little practical significance. Exxon has no right to recover from Qatar National under the Agreement because Exxon has released Qatar National from liability. And, if the Underwriters should lose to Exxon, and seek contribution from Qatar National, they will have to bring suit in a federal court anyway. *See* U.S. Const. Art. III, § 2; 28 U.S.C. §§ 1332(a)(4), 1603(a) (federal courts have exclusive jurisdiction to hear suits against agencies of foreign governments). Thus, as far as Qatar National is concerned, the exercise of federal jurisdiction will not occasion additional unnecessary suits.

The four insolvent insurers are defendants in the Texas action, but have not joined the Underwriters as plaintiffs in the Southern District. If the Texas court enters judgment before

the federal court does, that judgment will conclusively determine the insolvent insurers' liability by virtue of res judicata.

If, on the other hand, the federal court enters judgment first, the insolvent insurers would not appear to be bound by res judicata because they are not parties to the federal action. In theory, then, no matter which way the federal court ruled, Exxon will have to continue to litigate in Texas against the insolvent insurers.

As Exxon points out, this chain of events could lead to inconsistent interpretations of the Agreement, and, as Exxon reads *Lumbermens Mutual Casualty Company v. The Connecticut Bank & Trust Company*, this supports abstention. *See* 806 F.2d at 414-15. We find *Lumbermens* distinguishable.

In *Lumbermens*, various insurance companies had issued liability insurance policies for Raymark Industries, an asbestos manufacturer, for different periods over a 42-year span. About 30,000 personal injury lawsuits were pending against Raymark, and the insurers disagreed as to whether, for coverage purposes, the injuries occurred on the date of exposure to asbestos or the date the injury manifested itself. Zurich Insurance, one of Raymark's primary insurers, sued Raymark and all other primary insurers in Illinois state court, for a declaration that asbestos injury occurs at the time of exposure, not the date the injury is discovered. All Raymark's excess insurers eventually joined the suit. *See Lumbermens*, 806 F.2d at 412-13.

A second-layer excess insurer, Lumbermens Mutual, had agreed to cover Raymark for liabilities in excess of Raymark's primary coverage (provided by Zurich) and first-layer excess coverage (provided by American Home Insurance). Lumbermens Mutual sued Raymark in federal court, raising solely the issue about the timing of injury. Zurich and American Home, however, were not parties to the

federal suit. The district court stayed the federal proceeding in light of the state court action, and this Circuit affirmed, finding that *Colorado River* abstention was proper. *See id.* at 414-15.

Integral to *Lumbermens*'s holding was that inconsistent determinations by the two courts as to when asbestos injuries occur could leave Raymark without sufficient coverage. *See* 806 F.2d at 415. That is, if the federal court entered judgment first, and the state court followed with a contrary judgment, Raymark would be reimbursed by either Zurich and American Home *or* Lumbermens Mutual, but not all three. As a result, Raymark would be stranded without full coverage, even though it had contracted for full coverage. *Lumbermens* also noted that inconsistent judgments would render the "allocation of indemnity and defense costs and the handling and administration of over 30,000 asbestos-related claims against Raymark absolutely impossible." *Id.*

Compared to *Lumbermens*, the possibility of inconsistent adjudications in our case pales to insignificance. First, Raymark's entitlement to full coverage was not in question in *Lumbermens*; the issue there was which insurers were liable for the coverage. Here, by contrast, the dispute centers on whether, under the Agreement, Exxon may recoup its losses at all. Thus, we do not face a situation where inconsistent adjudications may deprive Exxon of its due coverage. Second, the four insurers who are not federal plaintiffs are insolvent, and probably judgment-proof. *See, e.g., In re New York City Asbestos Litigation*, 151 Misc. 2d 1, 572 N.Y.S.2d 1006, 1010 (Sup. Ct. 1991) (noting that a defendant who is insolvent may be unable to contribute to a judgment), *modified on a different issue*, 593 N.Y.S.2d 43 (App. Div. 1st Dep't 1993). Third, inconsistent judgments will not complicate the administration of liability claims against Exxon because these claims will have already been resolved. Finally, we note that the four insolvent insurers constitute a minuscule fraction of the Underwriters, and are

likely responsible for a trifling percentage of the total coverage provided by the Agreement. Given these important differences, the risk of inconsistent judgments here is inconsequential.

Finally, and most significantly, we note that here, unlike *Lumbermens*, resolution of the dispute hinges upon a novel determination of federal law. *See Lumbermens*, 806 F.2d at 415 ("state law supplies the rule of decision on the merits"). On balance, the possible annoyance that piecemeal litigation may cause here hardly offsets the commanding presence of a federal question of first impression.

C. *The Remaining Colorado River-Moses Cone Factors*

Colorado River requires us to look at whether either the federal or state court has obtained jurisdiction over a res, and whether the federal forum is more or less convenient than the state. *Colorado River*, 424 U.S. at 818. Here, the district court determined that these factors had no bearing on the abstention analysis because no *res* was involved, and because New York and Texas were equally convenient fora.

While the district court's factual findings on these two points were sound, the court erred by concluding that they were totally neutral on the abstention question. When the dispute lacks a *res* and the federal forum is just as convenient as the state, these two factors *favor* retention of the case in federal court. *See DeCisneros*, 871 F.2d at 307; *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327-28 (2d Cir. 1986).

The order in which the actions were filed must also be considered. *Colorado River*, 424 U.S. at 818. This factor requires consideration of "how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21-22. While neither action has progressed very far, some discovery has occurred in the Texas action. Also, Exxon expects to schedule

a trial date in Texas for as early as the end of 1995; it is unclear when a federal trial could be held. The Texas action being further along, this factor slightly favors abstention.

The final *Colorado River-Moses H. Cone* factor looks at the capability of the state forum to safeguard the federal plaintiffs' rights. *Moses H. Cone*, 460 U.S. at 26. The Underwriters have offered no reason for us to doubt the Texas court's ability to protect their rights. This factor somewhat favors abstention as well.

D. *The Balancing*

In balancing the six *Colorado River-Moses H. Cone* factors, we find that the federal law issue is truly a brooding omnipresence. As discussed, a major determinant of the Underwriters' liability to Exxon will be whether maritime losses caused by an insured's recklessness are fortuitous. This is a novel issue of federal admiralty law, and a federal court should decide it. In addition, this dispute lacks a *res*, and the fora are equally convenient. While the other three factors tilt towards abstention, they do so only tepidly. Accordingly, we see no exceptional circumstances here, and hold that the district court abused its discretion by abstaining.

While we loathe wasting judicial resources, it would be worse to cede federal review of an issue of federal law merely because Exxon won the race to judgment in state court. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 14.2, at 668 (1989) ("[T]he Supreme Court rightly has refused to allow those who prefer to litigate in state court to have the power to prevent federal court review simply by filing a suit in state court."). On balance, we choose the lesser evil.

CONCLUSION

Unlike *Pullman*, *Burford*, and *Younger* abstention, which implicate lofty notions of constitutionalism, the decision to abstain under *Colorado River* is driven by the more mundane problems of judicial efficiency. Accordingly, in "the absence of weightier considerations of constitutional adjudication and state-federal relations," the federal action should generally continue. *Colorado River*, 424 U.S. at 818.

We reverse the district court's judgment of dismissal. REVERSED.

APPENDIX D

Amended Memorandum Opinion and Order of the United States District Court for the Southern District of New York dated July 18, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN RICHARD LUDBROOKE YOUELL, et al.,

Plaintiff(s),

-against-

EXXON CORPORATION,

Defendant(s).

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93 Civ. 6093 (LAP)

LORETTA A. PRESKA, District Judge:

This is an action by the Underwriters of Exxon Corporation's ("Exxon") Global Corporate Excess ("GCE") Coverage for a declaratory judgment that the GCE Coverage does not cover certain losses incurred by Exxon as a result of the grounding of the Exxon Valdez. The Underwriters also ask the Court to segregate issues falling within the policy's mandatory arbitration clause and order such issues to arbitration. Presently considered is Exxon's motion to dismiss the action for lack of subject matter jurisdiction, or, alternatively, to dismiss or stay the action in favor of pending state court proceedings.

BACKGROUND

On March 24, 1989, the Exxon Valdez ran aground off the coast of Alaska. Approximately 258,000 barrels of crude oil escaped into the water and eventually washed onto adjacent

shorelines. As a result of the accident, Exxon incurred expenses and liabilities for, inter alia, cargo loss, clean up, and third-party claims.

By letter dated April 4, 1989, Exxon purported to give the Underwriters certain notice of loss arising out of the Exxon Valdez incident. On October 30, 1990, the Underwriters formally denied Exxon's claims. Nevertheless, over the next three years Exxon and the Underwriters continued negotiating and engaged in non-binding mediation. Unfortunately, they were unable to resolve their differences, and on August 4, 1993, Exxon filed suit against the Underwriters in the District Court of Harris County, Texas ("the Texas action"). Exxon asserted claims for breach of contract, breach of the Underwriters' covenant of good faith and fair dealing, and violations of the Texas Insurance Code, based on the Underwriters' refusal to pay Exxon's claims. The Underwriters removed the Texas action to federal court and filed a motion to transfer the action to New York. On Exxon's motion, however, the federal court remanded the action back to the Texas court, where it remains pending.

On the same day the Underwriters filed their removal petition in the Texas action, they also instituted the present suit in this Court. The 30-count complaint is essentially a mirror image of Exxon's complaint in the Texas action. The Underwriters seek various declaratory judgments to the effect that Exxon's Exxon Valdez-related losses are not within the GCE Coverage and that the Underwriters have at all times acted in good faith with respect to Exxon. The sole significant difference between the complaint in this action and the Texas complaint is Count XXX, which requests the Court to determine which issues in this dispute fall within Section IIIB's mandatory arbitration clause and to order those issues to arbitration. Exxon's complaint in the Texas action makes no reference to arbitration.

In lieu of answering the Underwriters' complaint, Exxon interposed the present motion to dismiss for lack of subject matter jurisdiction or, in the alternative, to dismiss or stay the complaint in deference to the Texas action. For the reasons stated below, the motion is granted and the case is dismissed.

DISCUSSION

A. *Subject Matter Jurisdiction*

In their complaint, the Underwriters assert three distinct bases of subject matter jurisdiction: 28 U.S.C. § 1333 (admiralty and maritime), 28 U.S.C. 1331 (federal question), and 9 U.S.C. § 203 (jurisdiction in aid of international arbitration agreements). The Court need not examine the latter two bases, because insofar as this case involves marine insurance, it falls within the admiralty jurisdiction. *E.g.*, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 20 L. Ed. 90 (1870). Exxon, in fact, concedes as much, arguing only that the Court should decline to exercise its admiralty jurisdiction, not that such jurisdiction does not exist.[1] Accordingly, the Court will treat the motion as one for abstention rather than dismissal for lack of jurisdiction.

B. *Abstention*

On the issue of abstention, the initial question is what standard the Court should apply in deciding whether to decline to exercise its jurisdiction. Both parties agree that none of the traditional categories of abstention -- *Pullman*, *Younger*, and *Burford* -- apply here. Exxon urges the Court to apply the

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[1] Almost halfheartedly, Exxon does argue that declaratory relief is unavailable in maritime actions. Numerous cases in this circuit, however, belie that proposition. *See, e.g., Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); *Greenwich Marine, Inc. v. S.S. Alexandra*, 339 F.2d 901, 907 (2d Cir. 1965); *Commercial Union Insurance Co. v. Horne*, 787 F. Supp. 337 (S.D.N.Y. 1992).

Brillhart doctrine, which provides that "when a declaratory judgment is requested, the district court is 'under no compulsion to exercise that jurisdiction' if the controversy might be settled more expeditiously in state court." Erwin Chemerinsky, *Federal Jurisdiction* 670 (1989) (quoting *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 494, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942)). The Underwriters, on the other hand, argue that *Brillhart* has been superseded by *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), where the Supreme Court established comprehensive guidelines for abstention on the grounds of parallel state proceedings.

Among the Circuits, there is conflict on the issue of whether the relatively lax abstention standard announced in *Brillhart* for declaratory judgment actions survived *Colorado River*'s enunciation of a stricter test for general application. Compare *Continental Cas. Co. v. Robsac*, 947 F.2d 1367 (9th Cir. 1991) (applying *Brillhart*) with *Board of Education v. Bosworth*, 713 F.2d 1316 (7th Cir. 1983) (applying *Colorado River*). In this Circuit, however, the answer is clear: a court asked to abstain from a declaratory judgment action on the basis of parallel state court proceedings must apply the doctrine of *Colorado River*. *See Lumbermens Mutual Cas. Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411, 413 (2d Cir. 1986).

Colorado River Abstention

Generally, "where . . . a federal court properly has subject matter jurisdiction, it has a 'virtually unflagging obligation' to exercise that jurisdiction, even if an action concerning the same matter is pending in state court." *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327 (2d Cir. 1986) (quoting *Colorado River*, 424 U.S. at 817-818). In exceptional circumstances, however, where justified by considerations of judicial economy and comprehensive disposition of litigation, a federal court may

decline to exercise its jurisdiction in deference to pending state court proceedings. *Colorado River*, 424 U.S. at 817-819. This exception is a narrow one, and the party arguing for abstention bears a heavy burden of persuasion. *Bank of N.Y. v. Bin Saud*, 628 F. Supp. 474, 476 (S.D.N.Y. 1986). "Only the clearest of justifications will warrant dismissal" or stay of the federal action. *Colorado River*, 424 U.S. at 819; *Bethlehem Contracting*, 800 F.2d at 327 n. 1 (noting that the abstention analysis is the same whether a party seeks stay or dismissal).

The Supreme Court has identified six factors a district court should weigh in considering whether a defendant has established "exceptional circumstances" warranting abstention: (1) Whether either the federal or state court has assumed jurisdiction over any "res" or property; (2) inconvenience of the federal forum; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether state or federal law supplies the rule of decision; and (6) whether the state court proceeding will adequately protect the rights of the parties. *Id.* at 327 (citing *Colorado River*, 824 U.S. at 818, and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23-27, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). Consideration of these elements is within the sound discretion of the district court. *Moses H. Cone*, 460 U.S. at 19. However, a court is not to use the factors as a checklist, tallying those for and against abstention. Rather, the Court must determine which factors are important in a given case and then decide whether, on balance, they make out exceptional circumstances supporting abstention. *Id.* at 16.

Colorado River Applied

The first *Colorado River* factor, jurisdiction over a "*res*," is irrelevant here. Neither this Court nor the Texas court has assumed jurisdiction over any *res*.

The second factor, inconvenience of the federal forum, while not irrelevant, is similarly of no use to Exxon. As a

large multinational corporation, Exxon is presumably capable of bearing the costs of litigating in New York. It argues that witnesses and evidence are located in Texas, and that the defendants are subject to jurisdiction there. The Underwriters, however, point out that witnesses and evidence are also located near New York. And, of course, the defendants in the Texas action are all present in this action as plaintiffs. Overall, the balance of inconvenience does not tip markedly in either direction. Thus, the second factor contributes little, if anything, toward establishing exceptional circumstances.

Skipping to the fourth factor, the order in which jurisdiction was obtained, the Court notes that Exxon filed the Texas action about a month before the Underwriters instituted this suit. Yet, evaluation of this factor requires more than a mere comparison of filing dates. In considering when the competing fora established jurisdiction, the Court's purpose is to see if one action or the other has progressed to such a degree that it would be particularly wasteful to proceed concurrently elsewhere. *Moses H. Cone*, 460 U.S. at 21. In the instant matter, neither this action nor the Texas action has advanced very far. In this action, there has been no discovery by the parties or consideration of the merits by the Court. The only activity thus far has been the briefing of the parties' respective motions. Similarly, in the Texas action, because the parties have spent the past months arguing its removal and remand, there has been very little progress towards resolution. Significantly, however, the Texas court has set a date of March 27, 1995 for the trial of Exxon's nonarbitrable claims. Given the embryonic development of this action, the nine judicial vacancies currently on this Court, and the Court's resultant backlog of cases, it is unlikely that a trial here could occur until significantly after that March date. Accordingly, factor four weighs in favor of abstention.

Factor five, the source of the rule of decision, weighs in favor of abstention, albeit not heavily. In *Moses H. Cone*, the Supreme Court explained that while the presence of state law

issues may in some cases weigh slightly in favor of abstention, "the presence of federal law issues must always be a major consideration weighing against surrender." 460 U.S. at 26. Here, state law issues predominate. The heart of this matter is a dispute over an insurance policy which is governed primarily by state law.[2] Moreover, the state interest in applying its law is particularly strong in the insurance area, which has long been dominated by state regulation. *See State Trading v. Assuranceforeningen Skuld*, 921 F.2d 409 (2d Cir. 1990) (citing *Wilburn Boat Co.*, supra).

The Underwriters posit two federal law issues weighing against abstention. First, they argue, the recognition and enforcement of the arbitration clause in Section IIIB of the GCA [sic.] Coverage is a matter of substantive federal law. 9 U.S.C. §§ 201-207. This would be true, but for the fact that Exxon has agreed to arbitrate its claims under Section IIIB. In

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[2] The Underwriters correctly note that since the contract at issue here is for marine insurance, it is governed by applicable rules of federal maritime law. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368 (1955). The larger holding of *Wilburn Boat Co.*, however, is that state law should be employed in marine insurance cases whenever possible. *Id. See also Golden Eagle Liberia v. St. Paul Fire & Marine*, 685 F. Supp. 393, 396 n. 2 (S.D.N.Y. 1988) ("Absent a well-established federal admiralty rule, state law governs the interpretation of marine insurance contracts."), vacated, 718 F. Supp. 1097 (S.D.N.Y. 1988). In fact, since *Wilburn Boat Co.*, the law has developed so that "questions about the interpretation of marine insurance policies are generally . . . decided under local law, rather than as a matter of admiralty law." *Armada Supply Inc. v. Wright*, 665 F. Supp. 1047 (S.D.N.Y. 1987), aff'd in part, rev'd in part, 858 F.2d 842 (2d Cir. 1988). *See also Commercial Union Ins. Co. v. Horne*, 787 F. Supp. 337 (S.D.N.Y. 1992) ("The scope and validity of marine insurance policy provisions and the consequences of breaching them are determined by state law." (citing *Wilburn Boat Co.*)). In view of this and the Underwriters' failure to identify any specific admiralty rule applicable here, the Underwriters' reliance on *Wilburn Boat Co.* is misplaced.

fact, upon Exxon's motion, the Texas court recently severed Exxon's Section IIIB claims from the action there and stayed them pending arbitration. Consequently, there is no need for this Court to determine the validity of the arbitration clause or to compel its enforcement, and the case presents no issue of federal arbitration law. *See International Shipping Co. v. Hydra Offshore, Inc.*, 675 F. Supp. 146, 153 (S.D.N.Y. 1987), aff'd, 875 F.2d 388 (2d Cir.), *cert. denied*, 493 U.S. 1003, 107 L. Ed. 2d 558, 110 S. Ct. 563 (1989). The Underwriters contend that disputes as to the procedures and scheduling of arbitration present matters for resolution under federal law. These issues, however, are for the arbitrator to resolve, not this Court. *See Matter of U.S. Lines And Liverpool & London S.S.*, 833 F. Supp. 350, 353 (S.D.N.Y. 1993). Similarly, the question of which of Exxon's claims fall under the arbitration clause is for the arbitrator to decide.[3]

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[3] The Underwriters contend that the Court must retain jurisdiction to determine and segregate arbitrable issues. However, the broad arbitration clause of Section IIIB, which by its terms covers "any differences" (emphasis added) relating to that section, makes such intervention unwarranted; whatever claims Exxon advances under Section IIIB will be arbitrated. *See Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63-64 (2d Cir. 1983) (holding that where parties have executed a broad arbitration clause, court should simply insure arbitration proceeds and allow the arbitrator to determine which issues are arbitrable). It may be, as the Underwriters seem to fear, that issues before the arbitrator will overlap with issues addressed in the judicial forum where Exxon's non-arbitrable claims are heard. This, however, results from the structure of the GCE Coverage, which mandates arbitration for claims brought under Section IIIB but not for claims brought under other sections. Although the issue is not before me it may be that the parties have agreed that the arbitration of Exxon's claims under Section IIIB will have no preclusive effect on the litigation of Exxon's other claims. Exxon notes that the Underwriters' memorandum in support of their motion to determine and segregate arbitrable disputes requests the Court to "enter an order" providing, among other things, that the arbitration of issues under Section IIIB be "without prejudice to Underwriters' rights to raise the same defenses in litigation of non-arbitrable claims for coverage under Section I and III(a) of the GCE agreements" and that Exxon indicated that it would be willing

The second asserted issue of federal law is the possible preclusive effect of certain federal statutes on certain Alaska statutes which are the basis of the liability for which Exxon seeks coverage from the Underwriters. Relying on a decision of the United States District Court for the District of Alaska in In re Exxon Valdez, C.A. No. 89-095 (Order No. 121, Dec. 21, 1992), the Underwriters contend that any liability Exxon might have as a marine cargo owner (the liability at issue here) can only arise under federal law. Consequently, the Underwriters argue, any determination as to coverage for Exxon's cargo owner liability will necessarily involve application and interpretation of federal law.

Assuming all this to be true, the fact remains that Exxon's claims against the Underwriters for coverage are insurance claims, arising under state law. The potential for preclusion arises as only one of several defenses the Underwriters will assert. Moreover, the issue has been already been comprehensively treated, if not definitively resolved, by the Alaska federal court. The core and bulk of this action involves the application of state law in a context where the states have a strong interest in seeing their law applied. In such circumstances, the presence of a federal law issue in a small portion of the overall dispute does not carry the weight described in *Moses H. Cone*. Of course, *Moses H. Cone*'s admonition that the predominance of state law issues should not be accorded undue emphasis must still be heeded. Accordingly, factor five militates toward abstention, but only slightly.

With respect to the sixth factor, the adequacy of the state proceeding to protect the rights of the party seeking federal jurisdiction, the Underwriters argue that the Texas court is inadequate because it may not be bound to recognize and enforce Section IIIB's arbitration clause. *See McDermott v.*

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to stipulate that the arbitration have no preclusive effect on the litigation of disputes under Sections I and IIIA.

Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991) (state courts are not necessarily required to enforce international arbitration agreements under 9 U.S.C. §§ 201-207). This argument is rendered moot, however, by the Texas court's recent order severing and staying the Section IIIB claims pending arbitration.[4] As for the rest of the dispute, the *Harris County* court--sitting within a tugboat horn's range of the Houston Ship Channel and the Gulf of Mexico--is assuredly competent to handle the marine insurance issues.

Returning, finally, to the third factor, the Court must appraise the desirability of avoiding piecemeal litigation of this dispute. In performing that task, courts of this circuit have considered both the potential for duplicative litigation and the danger of inconsistent adjudications. *See, e.g., De Cisneros v. Younger*, 871 F.2d 305, 308 (2d Cir. 1989); *Bank of New York v. Bin Saud*, 628 F. Supp. 474, 476 (S.D.N.Y. 1986). The Court of Appeals has held that this factor "should be given great weight in the context of declaratory judgment actions. . . ." *Lumbermens*, 806 F.2d at 414. *Accord Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306 (1st Cir. 1986).

Concerning the danger of inconsistent adjudications, the law of this Circuit is that courts must be "particularly careful to avoid piecemeal litigation that could lead to conflicting interpretations of the same insurance policy." *Federal Insurance Co. v. Skopbank*, No. 92 Civ. 2871, 1994 WL 115999, at *3 (S.D.N.Y. Mar. 29, 1994). *See also General Reinsurance Corp. v. CIBA-Geigy Corp.*, 853 F.2d 78, 81 (2d Cir. 1988); *Lumbermens*, 806 F.2d at 414 ("The critical factor to us [in affirming stay of insurers' declaratory judgment action] is the desirability of avoiding piecemeal litigation and

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[4] If a need to compel or enforce arbitration should arise in the future, a federal forum will, of course, be available for that limited purpose. However, the hypothetical possibility that such a scenario will come to pass is no basis for concluding that the Texas forum is inadequate.

the possibility of two interpretations of the same policy language in different courts . . . ."). That, of course, is precisely the danger presented here. The Underwriters' declaratory judgment action implicates the identical policy provisions and defenses at issue in the Texas action. Exxon, therefore, faces the possibility that the two fora will construe the policy provisions differently, leaving Exxon without coverage to which it may be entitled. *See Lumbermens*, 806 F.2d at 414.

Looking to the potential for duplicative litigation, the Court notes initially that this action, now stripped of its arbitration aspects, presents the same issues and parties present in the Texas forum. As one Judge of this Circuit has observed, "filing a declaratory judgment action in federal court to resolve state-law issues currently pending in a state court is certainly a peculiar and uneconomical manner of resolving disputes." *Bagdan v. Sony Corp. of America*, 767 F. Supp. 81, 83 (D.Vt. 1991) (Parker, J.). *See also Lumen Construction, Inc. v. Brant Construction Co., Inc.*, 780 F.2d 691, 695-696 (7th Cir. 1986) (stay proper where state court litigation would probably eliminate the need for federal court proceedings).

The duplicative character of this action is particularly significant here because of its implications for comity between federal and state courts. Notwithstanding the Second Circuit's rejection of the Brillhart abstention standard, Brillhart's observation that it is "vexatious for a federal court to proceed in a declaratory judgment suit where another suit [presenting the same issues] is pending in a state court" remains valid. 316 U.S. at 495. *See also Lumbermens*, 806 F.2d at 414 ("The avoidance of piecemeal litigation should be given great weight in the context of declaratory judgment actions because such litigation would complicate and fragment the trial of cases and cause friction between state and federal courts."). Where, as here, there is no significant federal interest to be vindicated by federal court intervention, duplication of the state court's efforts by a federal court is especially offensive.

Additionally, allowing this declaratory judgment action to proceed during the pendency of the virtually identical Texas action constitutes an abuse of the declaratory judgment remedy. *See Fuller Co.*, 782 F.2d at 308 n.3 (noting that propriety of plaintiff's invocation of declaratory judgment remedy is a relevant consideration under *Colorado River*). As the late Judge Friendly observed, the appropriate use of declaratory judgment actions is to

> "create[] a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it."

United States v. Doherty, 786 F.2d 491, 498 (2d Cir. 1986) (quoting Charles Wright, *The Law of Federal Courts* 671 (1983)). By contrast, it is a "misuse of the Declaratory Judgment Act" to employ it to "gain a procedural advantage and preempt the forum choice of the plaintiff in [a] coercive action. . . ." *Great American Insurance Company v. Houston General Insurance*, 735 F. Supp. 581, 586 (S.D.N.Y. 1990). *See also* 10A Charles Wright, Arthur Miller & Michael Kane, *Federal Practice and Procedure* § 2758 at 631-632 (1983) (The "Declaratory Judgment Act was not intended to enable a party to obtain a change of tribunal from state to federal court. . . .").

The Underwriters' declaratory judgment action falls into the latter paradigm. At the time the action was filed, the Underwriters' perceived need to compel arbitration perhaps provided a basis for a federal action. The arbitration issue gone, however, what remains is an action wherein the federal court is asked to dispense an interpretation of an insurance contract currently being litigated in a state court. The Texas action--which will ultimately resolve all of the issues raised in the Underwriters' complaint--renders this suit wholly unnecessary. The raison d'etre of the declaratory judgment--to

provide an adjudicative forum to parties otherwise without one--is not present here. Thus, to allow this action to proceed would be an abuse of the remedy.

CONCLUSION

In sum, I find the considerations relating to the third *Colorado River* factor (avoidance of piecemeal litigation) to be by far the most significant in the context of this case. Therefore, those considerations, which point strongly toward abstention, are entitled to the greatest weight in the *Colorado River* balancing process. Of secondary importance is the fifth factor (whether state or federal law provides the rule of decision), which, because I find a strong state interest in insurance regulation and an absence of significant federal issues, points moderately toward abstention. The fourth factor (the order in which jurisdiction was obtained) also weighs slightly in favor of the Texas forum because that is where a trial can be had sooner. Finally, as set out above, the remaining factors are either not applicable or so evenly balanced as to contribute nothing to the mix. Weighing all the factors, and giving them their appropriate weight in the particular circumstances of this case, I find that the relative importance and weight of the third factor constitute exceptional circumstances requiring abstention.

Accordingly, the complaint is DISMISSED.

Dated: New York, New York
July 18, 1994

LORETTA A. PRESKA, U.S.D.J.

APPENDIX E

APPENDIX E

Exxon has no corporate parent and the following list identifies Exxon's nonwholly owned subsidiaries:

165550 Canada Limited
172965 Canada Limited
2849518 Canada Limited
AFSC Management Limited
AGA Progas a.s
AGES Arbeitsgomeinschaft Gebuehrenerhobungesystem GbR, Dusse
ASHCO Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Acquifund Resources Limited
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit beschreenkter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B.V.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company
AquaAir, Inc.

Aramco Services Company
Asakawa Sekiyu K.K.
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BFS Berlin Fuelling Services GbR
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.
Brickwood Holdings Pty. Ltd.
Canada Imperial Oil Limited
Canadian Reserve Oil & Gas Ltd.
Castle Peak Power Company Limited
CeraNem Separations, Inc.
Cerafilter Systems, Inc.
Cerafilter Systems, L.P.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots Petroliers de la Corse
Depots de Petrole Cotiers

Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Disma S.r.l.
Dixie Pipeline Company
E S F Limited
EPDMCO, L.P.
ETD Tankdienst Gesellechaft Duesseldorf GbR
Eagle Kenso K.K.
Eagle Reinsurance Co. Ltd.
East Asia Response Private Limited
East Texas Salt Water Disposal Company
Eastern Canada Response Corporation Ltd.
Eco Lubrifiants
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoellsitung G.m.b.H.
Energie Marketing Service GmbH
Enterprise Housing Partners 1992 Limited Partnership
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H
Erdoel-Raffinerie Doureg-Norag GmbH
Esso (Overseas) Pension Trust Limited
Esso Antilles-Guyana, S.A.
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso France S.A.

Esso Lub'Services
Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso Societe Anonyme Francaise
Esso Standard Thailand Ltd.
Esso Standard Tunisia S.A.
Esso Technologies et Services (E.T.S.)
Esso Yukong Specialities Ltd.
Etablissements Cloarec
Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Middle East Holdings Inc.
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Chemical S.A.
Exxon Mobile Bay Limited Partnership
Exxon de Colombia S.A.
F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Federated Pipe Lines (Western) Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Geschaeftsstadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft
Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
GVOE Gabindo-Verwartungesellschaft der Ninoraloelwirtschaft
Gas Direct Limited
Gasunie Engineering B.V.

Gasunie Warmte/Kracht Emmen B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geogaz Lavora
Ges. fur Mineraloslveredlung und Distribution Rhaesa mbH
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Great Lakes Response Corporation of Canada
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de Saint-Pierre des Corps (G.P.S.P.C.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Marne (G.P.V.M.)
Groupement d'Exploitation du Depot de Reception de Chennevis
Guam Response Services Ltd.
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitungs-G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Heinrich Schneider Spedition GmbH

Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokuyu Sekiyu K.K.
Hong Kong Pumped Storage Development Company, Limited
Hong Kong Response Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario General Partnership)
Imperial Oil Limited
Imperial Oil Resources N.W.T. Limited
Imperial Oil Resources Ventures Limited
Imperial Oil Resources an Alberta limited partnership
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Iraq Petroleum Company, Limited
Japan Butyl Company Limited
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Momose Shiojiri Stand
K.K. Toresen
K.K. Aizu Generel
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Gas Butsuryu Kansai
K.K. General Gas Butsuryu Kanto
K.K. General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech
K.K. Genex

K.K. Heian Sekiyu
K.K. Kyosi Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Tama General K.K.
K.K. Toko
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
KX Industries, L.P.
Kabushiki Kaisha Sankyo Plastics
Kabushiki Kaisha Serubisu
Kai Tak Refuellers Company Limited
Kansai Chuo Sekiyu K.K.
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbh
Kawasaki Kygnus Sekiyu Hanbai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kemcor Australia Pty. Ltd.
Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.
Kemcor Plastics Pty. Ltd.
Kent Gas Company Limited, The
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Korea Perchem Company Limited
Kosxon Chemical Company Limited
Kowa Sekiyu K.K.
Kumho E.P. Rubber Co., Ltd.

Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K.K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kygnus Trading Kabushiki Kaisha
Kyushu Eagle K.K.
L-Net East K.K.
L-Net West K.K.
L12A (Groep) B.V.
L12B/L15B (Groep) B.V.
L14 (Groep) B.V.
L15A (Groep) B.V.
L2 (Groep) B.V.
L5a (Groep) B.V.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambas
Les Emulsions de Feyzin at du Dauphine
Liants Routiers de la Vallee de la Loire (LRVL)
Liants Routiers de la Vallee du Rhin (L.R.V.R.)
Liants Routiers du Gard (L.R.G.)
Lilac Sekiyu Kabushiki Kaisha
Lily Sekiyu K.K.
Lithcon Petroleum International (Bahamas) Inc.
Lithcon Petroleum Taiwan Inc.
MEGAL FINCO
MEGAL GmbH
Maasvlakte Olie Terminal C.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Shd
Manchester Airport Storage and Hydrant Company Limited
Marugo Gas K.K.

McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
Meiji Sekiyu K.K.
Mikawa Bussan K.K.
Mitake Unso K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrank
Mode Wheel Property Limited
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Multi Tank Card B.V.
Mytex Polymers (General Partnership)
N.V. Nederlandae Gasunie
NAM - K 14 B.V.
NAM - K 15 B.V.
NAM - K 7 B.V.
NAM - Pipeline B.V.
NAM-K17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nalco/Exxon Energy Chemicals Argentina S.A.
Nalco/Exxon Energy Chemicals Brasil LTDA.
Nalco/Exxon Energy Chemicals Columbia S.A.
Nalco/Exxon Energy Chemicals Limited
Nalco/Exxon Energy Chemicals, Inc.
Nalco/Exxon Energy Chemicals, L.P.
Name: EDE

Name: IORL
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B.V.
Netra AG
Netra GmbH
New Cure, Inc.
Newcastle Coal Shippers Pty. Limited
Nichiel Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Niedersaechsische Energie Agentur GmbH
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereltungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankte
Noroxo
Northward Developments Ltd.
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Spill Holdings Private Limited
Oil Spill Response Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Osaka General Gas K.K.
Osaka Kygnus K.K.
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
Pacesetter Enterprises Limited

Pars Investment Corporation
Petrosvibri S.A.
Plantation Pipe Line Company
Port-Jerome Gaz (P.J. Gaz)
Portland Pipe Line Corporation
Primaeroel GmbH
Prince William Sound Oil Spill Response Corporation
Progas Limited
Projectbureau W/K S.V.
Q16a (Groep) B.V.
Quadrant Gas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutia, S.A.
Regulus Holding (Singapore) Pte. Ltd.
Rexplas Sdn Bhd
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam Antwerpen Pijpleiding C.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Rubiatec Sendirian Berhad
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliera sur Territoire Geneve
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
SERAM s.p.A.
SOVEXOIL Oil Field
Saitema Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S.A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Senboku Oil Kikoh K.K.

Service Aviation Paris (S.A.P.)
Shehtah Drilling Limited
Shimizu LNG K.K.
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Singapore Aromatics Company Private
Smiley Gas Conservation Limited
Sociedad Nacional de Oleoductos Ltda.
Sociedad de Inversiones Limited
Societa Italiana par l'Oleodotto Transalpino S.p.A.
Societa per Azioni Reffineria Padana Olil Minerali-SARPOM
Societe "Geominea-Caen"
Societe Anonyme "Produits Lubrifiants de Madagascar" - PROLU
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dech
Societe Esso de Recherches et d'Exploitation Petrolieres Ess
Societe Francaise EXXON CHEMICAL
Societe Havraise de Manutention de Produits Petroliers
Societe Malgache de Raffinage
Societe Paris-Manche
Societe Paris-Niel
Societe Reunionnaise d'Entrepossage
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Societe d'Exploitation & de Developpement d'Operations Comme
Societe d'Exploitation des Garages Les Stations Tour Eiffel

Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe de la Raffinerie d'Alger
Societe des Pipe-Lines de Strasbourg
Societe de Tranports Petroliers par Pipe Line
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de La Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-European
Southern Natural Gas Development Pty. Ltd.
Sriracha Power Company Ltd.
Standard Kaihatsu K.K.
Standard Service K.K.
Stansted Fuelling Company Limited
Statfjord Transport A/S
Sucre Gas, S.A.
Sueddeutsche Erdgas Transport Gesellschaft mit baschrankter
Sun East (Dublin) Company, Ltd.
Superior Disk Corporation
Surrey Gas Company Linited, The
Sussex Gas Company Limited, The
Syncrude Canada Ltd.
TAR-Tankanlage Ruemlang AG
TBF Tanklagerbetriebafuchrungages, m.b.H.
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TCA Plastics Inc.
TEAN Terminal B.V.
TFS Turbo Fuel Services GmbR, Hamburg
TGF Tankdienst Gesellschaft Frankfurt G.b.R.
TGM Tankdienst-Gesellschaft Muenchen GbR
TIBA Speditions GmbH

TLS Tanklager Stuttgart GmbH
Taihei Bussan K.K.
Taisai Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tankanlage A.G., Mellingen
Tanklager Altishausen A.G.
Tanklager Taegerschen AG
Tanklager-Gesellschaft Tegel G.b.R.
Tanklagergesellschaft, Koeln-Bonn G.b.R.
Tecnica Quimica Petrolera, S.A. de C.V.
Terminal Petrolier de Bordeaux (T.P.B.)
Thai Aliphatics Company Limited
Thai C-Center Company Limited
Thai Petroleum Pipeline Co., Ltd.
Thyssenges G.m.b.H.
Tohpren Co., Ltd. (Chemical)
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Chemical Nasu Co., Ltd.
Tonen Energy International Corp.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Filare Co. Ltd.
Tonen Film Company Limited
Tonen Kabushiki Kaisha
Tonen Kagaku K.K.
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K.K.
Tonex Company Limited

Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Northern Pipelines Inc.
Transalpine Oelleitung in Oesterreich Gesellschaft G.m.b.H.
Tsurumaru Unyu K.K.
UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Verbundnetz Gas AG
Wako Jushi Kabushiki Kaisha
Westdeutsche Erdoelleitungs-G.m.b.H.
Western Canada Marine Response Corporation
Westgas G.m.b.H.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabuskhiki Kaisha
Yuei Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)

APPENDIX F

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Norges Brannkasse Mutual Insurance Co. (Uni)

Skadeforsikringsselskapet Vesta A/S

Arig-Arab Ins. Group (BSC)

Skandia International Insurance Corp.

Storebrand Reinsurance Co., Ltd.

Gjensidige Norsk Skadeforsikring

Arendal Forsikringsselskab A/S

Polaris Assurance A/S

Samvirke Skadeforsikring A/S

Qatar General Ins. & Reinsurance Co.

Hansa Marine Insurance Co.

Norske Triton Insurance Co. Ltd.

(Star Insurance, Ltd.)

Hafnia Forsikring

Baltica Forskiring A/S

Sirius Insurance Co. Ltd., (Lansforsakringar Sirius Industrial & Marine)

Navigators Insurance Co.

Lloyd's & Institute Companies

Insurance Company of North America

Continental Insurance Company

Fidelity & Casualty Company of New York

Fireman's Insurance Company of Newark, New Jersey

Progressive Casualty Insurance Co.

Christiania General Insurance Corporation of New York

Reinsurance Corporation of New York

Worcester Insurance Company

Pennsylvania Lumbermens Mutual Insurance Company

Republic Insurance Company

United Reinsurance Corporation of New York

Colonia Insurance Company

United Fire and Casualty Company

Abu Dhabi National Insurance Co.

Compagnie De Reassurance De L'ile De France

Riunione Adriatic Di Sicurta

Societe Commerciale De Reassurance

Omnium Insurance & Reinsurance Co. Ltd.

Caisse Industrielle D'Assurance Mutuelle/ Languedoc

Eagle Star France

Pool Transport Eagle Star L'independence Pool

New York Marine and General Insurance Co., Through Mutual Marine Office

Yasuda Fire & Marine Insurance Co. Ltd.

Christiania General Insurance Corporation of New York, Through Trident Christiania, Inc.

AIG Oil Rig, Inc.

American Home Assurance Company

National Union Fire Insurance Corporation

New Hampshire Insurance Company

Tokio Marine & Fire Insurance Co.

Nippon Fire & Marine Insurance Company, Ltd.

Yasuda Fire & Marine Insurance Company

Fireman's Fund Insurance Company

Industrial Mutual Insurance Company, Through Hull and Company, Inc.

Indemnity Marine Assurance Co., Ltd.

Switzerland Insurance Company (UK) Limited

The Nippon Fire & Marine Insurance Company, Ltd., (UK) Ltd.

Fuji Fire & Marine Insurance Co. (UK) Ltd.

Folksam International Insurance Co. (UK) Ltd.

Hansa Marine Insurance Company (UK) Limited

Vesta (UK) Insurance Co., Ltd.

Colonia Insurance Company (UK) Limited

Ocean Marine Insurance Company, Ltd.

The Threadneedle Insurance Co., Ltd.

Norwich Union Fire Insurance Society Ltd.

Excess Insurance Company, Ltd.

The Scottish Lion Insurance Co., Ltd.

Yorkshire Insurance Company Limited

Scor (U.K.) Reinsurance Co. Ltd.

Phoenix Assurances Public Limited Company

La Reunion Francaise Soc. Anon. D Assurance Et Des Reassurances

The London Assurance

Sirius Insurance Co., (UK) Plc

Marine Insurance Company, Ltd.

Insurance Company of North America (UK) Ltd.

Northern Assurance Company Limited

London & Hull Maritime Insurance Company, Ltd.

English & Scottish Maritime & General Ins. Co. Ltd.

Prudential Assurance Co., Ltd.

Pearl Assurance Public Limited Company

Assicurazioni Generali S.P.A.

La Concorde Compagnie D'Assurances Contre Les Risques De Toute Nature

Terra Nova Insurance Company, Ltd.

Commercial Union Assurance Co.

Sphere Drake Insurance Plc

Dai-Tokyo Insurance Company (U.K.) Ltd.

Cornhill Insurance Plc

Allianz International Insurance Company Ltd.

Bishopsgate Insurance Ltd.

Leadenhall Insurance Ltd.

Preservatrice Fonciere T.I.A.R.D.

Compagnie D'Assurances

International Insurance Company of Hannover Limited

Lombard Continental Insurance Plc.

Atlas Assurance Company, Ltd.

Sovereign Marine and General Insurance Co. Ltd. of London

Tokio Marine & Fire Insurance Co. (U.K.), Ltd.

Taisho Marine & Fire Insurance Co., (U.K.) Ltd.

Storebrand Insurance Co. (U.K.) Ltd.

Atlantic Mutual Insurance Company

Wausau Insurance Co., (U.K.) Ltd.

New Hampshire Insurance Company

Minster Ins. Co. Ltd.

Turegum Insurance Co.

Polaris Assurance A/S

Cigna Insurance Company of Europe S.A.— N.V.

National Employers Mutual Legal & General Assurance Society Ltd.

Legal & General Assurance Society Ltd.

Chandos Insurance Co. Ltd.

Dominion Insurance Co. Limited

Sumitomo Marine & Fire Insurance Co. Ltd.

Orion Insurance Company plc

Skandia U.K. Insurance plc

Yasuda Fire & Marine Insurance Company of Europe, Ltd.